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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD KEITH HAGEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The term "misdemeanor crime of domestic violence" is defined to include any federal, state, or tribal misdemeanor offense, committed by a person with a specified domestic relationship to the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii). The question presented is:

Whether respondent's Texas conviction for misdemeanor assault by intentionally and knowingly causing bodily injury to a family member qualifies as a conviction for a "misdemeanor crime of domestic violence."

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Reasons for granting the petition 6
A. The decision below incorrectly constricts the scope of Section 922(g)(9) 7
B. The decision below conflicts with the decisions of other courts of appeals 14
C. The question presented is of recurring importance 16
Conclusion 19
Appendix A – Court of appeals order (Oct. 14, 2009) 1a
Appendix B – District court order of dismissal (Sept. 27, 2007) 3a
Appendix C – Memorandum and order, *United States* v. *King* (July 10, 2007) 6a
Appendix D – Court of appeals order denying hearing en banc (July 27, 2009) 15a
Appendix E – Court of appeals order denying rehearing (Mar. 3, 2010) 17a
Appendix F – Criminal information (Apr. 26, 2005) 19a
Appendix G – Judgment on revocation of community supervision (Dec. 16, 2005) 20a
Appendix H – Statutory provisions 22a

TABLE OF AUTHORITIES

Cases:

Bailey v. *United States*, 516 U.S. 137 (1995) 8
Chrzanoski v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) 15

Cases—Continued: Page

Commonwealth v. *Stratton*, 114 Mass. 303 (1874) 11
Gonzales v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 13
Johnson v. *United States*, 130 S. Ct. 1265 (2010) 11, 12, 13, 18
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 8, 10
Nijhawan v. *Holder*, 129 S. Ct. 2294 (2009) 5, 8, 17
State v. *Eakins*, 71 S.W.3d 443 (Tex. App. 2002) 3
State v. *Griffin*, 459 A.2d 1086 (Me. 1983) 15
State v. *Monroe*, 28 S.E. 547 (N.C. 1897) 11
Taylor v. *United States*, 495 U.S. 575 (1990) 17
United States v. *Alexander*, 543 F.3d 819 (6th Cir. 2008), cert. denied, 129 S. Ct. 2175 (2009) 15
United States v. *Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) 9, 10
United States v. *De La Fuente*, 353 F.3d 766 (9th Cir. 2003) 9
United States v. *Hayes*, 129 S. Ct. 1079 (2009) 2, 7, 16, 17
United States v. *King*, No. H-06-0363 (S.D. Tex. July 10, 2007) 4
United States v. *Nason*, 269 F.3d 10 (1st Cir. 2001) 8, 14, 15
United States v. *Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) 15
United States v. *Shelton*, 325 F.3d 553 (5th Cir.), cert. denied, 540 U.S. 916 (2003), and 543 U.S. 1057 (2005) 4, 13, 15
United States v. *Smith*, 171 F.3d 617 (8th Cir. 1999) 14
United States v. *Turley*, 352 U.S. 407 (1957) 11

Cases—Continued: Page

United States v. *Vargas-Duran*, 356 F.3d 598 (5th Cir.), cert. denied, 541 U.S. 965, and 543 U.S. 995 (2004) 5

United States v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007) ..... *passim*

United States v. *White*, No. 09-4114, 2010 WL 2169487 (4th Cir. June 1, 2010) 12

Statutes and guidelines:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i) 10, 12

8 U.S.C. 1101(a)(43)(M)(i) 17

18 U.S.C. 16(a) 4, 8, 9, 10, 15

18 U.S.C. 373(a) 10

18 U.S.C. 521(c)(2) 10

18 U.S.C. 922(a)(3) 19

18 U.S.C. 922(a)(6) 2, 4

18 U.S.C. 921(a)(33)(A) ..... *passim*

18 U.S.C. 921(a)(33)(A)(ii) 2, 6, 14

18 U.S.C. 922(b)(3) 19

18 U.S.C. 922(g)(1) 7

18 U.S.C. 922(g)(9) ..... *passim*

18 U.S.C. 922(s)-(t) 19

18 U.S.C. 924(a)(1)(A) 2, 4

18 U.S.C. 924(a)(2) 2

18 U.S.C. 924(e)(3)(A) 10

20 U.S.C. 1161w(f)(3)(A)(ii) (Supp. II 2008) 10

28 U.S.C. 540A(e)(1) 10

Statutes and guidelines—Continued: Page

Ala. Code § 13A-6-2(a)(1) (LexisNexis Supp. 2009) 9
Alaska Stat. § 11.14.100(a)(1) (2008) 9
Ariz. Rev. Stat. Ann. § 13-1105(A)(1) (2010) 9
Colo. Rev. Stat.:
§ 18-3-102(1)(a) (2009) 9
§ 18-3-204(1)(a) (1986) 15
Conn. Gen. Stat. Ann. (West 2007):
§ 53a-54a(a) 10
§ 53a-61(a) 16
Del. Code Ann. tit. 11, § 611 (2007) 16
Fla. Stat. Ann. § 784.03(1)(a) (West 2007) 16
720 Ill. Comp. Stat. Ann. 5/12-3(a)(1) (West 2002) 16
Iowa Code § 708.1(2) (West 1993) 14
La. Rev. Stat. § 14.33 (2007) 18
Miss. Code Ann. § 97-3-7(1) (West Supp. 2009) 17
Tex. Code Crim. P. art. 42.013 (West 2006) 3
Tex. Penal Code (West 2003):
§ 1.07(a)(8) 13
§ 12.21(a) 3
§ 22.01(a)(1) ..... *passim*
§ 22.01(b) (West Supp. 2004) 3
§ 22.01(b)(2) 3
United States Sentencing Guidelines:
§ 2L1.2 ..... 5, 15
§ 2L1.2, comment. (n.1(B)(iii)) 5
§ 4B1.2(a)(1) 15

Miscellaneous: Page

2 Joel Prentiss Bishop, *Bishop on Criminal Law* (John M. Zane & Carl Zollman eds., 9th ed. 1923) ... 11

2 Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 10, 11

Model Penal Code § 211.1(1) (1985) 16

Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119 (1946) 11

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The per curiam order of the court of appeals (App., *infra*, 1a-2a) is not published in the *Federal Reporter* but is available at 349 Fed. Appx. 896. The order of the district court granting respondent's motion to dismiss the indictment (App., *infra*, 3a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2009. A petition for rehearing was denied on March 3, 2010 (App., *infra*, 17a-18a). On May 28, 2010, Justice Scalia extended the time within which to file a petition

for a writ of certiorari to and including June 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this petition. App., *infra*, 22a-23a.

STATEMENT

Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9), and two counts of making false statements concerning whether he had been convicted of such an offense, in violation of 18 U.S.C. 924(a)(1)(A) and 18 U.S.C. 922(a)(6), respectively. Concluding that respondent's prior Texas conviction for misdemeanor assault on a family member was not a conviction for a "misdemeanor crime of domestic violence," the district court dismissed the indictment. The court of appeals affirmed. App., *infra*, 1a-2a.

1. Under 18 U.S.C. 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence * * * [to] possess in or affecting commerce, any firearm or ammunition." Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor under federal, state, or tribal law, committed by a person with a specified domestic relationship with the victim, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." 18 U.S.C. 921(a)(33)(A)(ii); see *United States* v. *Hayes*, 129 S. Ct. 1079, 1084 (2009). A person who knowingly violates that provision may be fined, imprisoned for not more than ten years, or both. 18 U.S.C. 924(a)(2).

2. In 2005, respondent was charged in Texas state court with misdemeanor assault in violation of Texas Penal

Code § 22.01(a)(1), which punishes any person who "intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." Tex. Penal Code Ann. § 22.01(a)(1) (West 2003). A violation of Section 22.01(a)(1) is a Class A misdemeanor, punishable by confinement in jail for a term not to exceed one year. *Id.* § 12.21(a) (West 2003); *id.* § 22.01(b) (West Supp. 2004). The criminal information alleged that respondent "did * * * unlawfully, intentionally and knowingly cause bodily injury to [the victim], a member of the Defendant's FAMILY, and hereafter styled the Complainant by STRIKING THE COMPLAINANT ON THE HEAD WITH THE DEFENDANT'S HAND." App., *infra*, 19a. Respondent was convicted of the offense, and the state court made an affirmative finding of domestic violence. *Id.* at 20a-21a.[1] Respondent was sentenced to one year of confinement, which was suspended in favor of two years of probation. His probation was later revoked, and he was sentenced to 60 days of confinement. *Ibid.*

3. In 2007, law enforcement officials discovered that respondent had possessed and attempted to purchase firearms after his 2005 conviction. Respondent was indicted on two counts of possession of a firearm by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. 922(g)(9) (Counts 1 and 4), and two counts of making false statements concerning whether he had been

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[1] A domestic relationship between the offender and the victim is not a required element of the assault offense under Texas Penal Code § 22.01(a)(1), but Texas courts include family-violence findings in criminal judgments to facilitate the prosecution of any subsequent assault against a family member as a felony under Texas Penal Code § 22.01(b)(2). See Tex. Code Crim. P. Ann. art. 42.013 (West 2006); *State* v. *Eakins*, 71 S.W.3d 443, 444-445 (Tex. App. 2002).

convicted of such an offense, in violation of 18 U.S.C. 924(a)(1)(A) (Count 2) and 18 U.S.C. 922(a)(6) (Count 3).

Respondent moved to dismiss the indictment, arguing that his Texas assault offense is not a "misdemeanor crime of domestic violence" because it does not "ha[ve], as an element, the use * * * of physical force." 18 U.S.C. 921(a)(33)(A). The district court granted the motion. App., *infra*, 3a-5a.

The district court acknowledged that the Fifth Circuit had previously held that a violation of Texas Penal Code § 22.01(a)(1) qualifies as a "misdemeanor crime of domestic violence" because the offense has as an element the use of physical force. App., *infra*, 4a, 5a (citing *United States* v. *Shelton*, 325 F.3d 553 (5th Cir.), cert. denied, 540 U.S. 916 (2003), and 543 U.S. 1057 (2005)). But the district court concluded that *Shelton* had been superseded by subsequent circuit precedent, as recognized in *United States* v. *Villegas-Hernandez*, 468 F.3d 874 (2006), cert. denied, 549 U.S. 1245 (2007). App., *infra*, 5a.[2]

In *Villegas-Hernandez*, the Fifth Circuit held that a violation of Texas Penal Code § 22.01(a)(1) is not a "crime of violence" under 18 U.S.C. 16(a)—which, much like Section 921(a)(33)(A), defines the term to mean an offense "that has as an element the use * * * of physical force against the person or property of another"—because assault by causing bodily injury does not have as an "element" the use of "physical force." 468 F.3d at 878-883. Understanding Section 16(a)'s reference to "physical force" to mean "'destructive or violent force,'" the court reasoned that injury "could result from any of a number of acts, with-

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[2] In so concluding, the district court adopted the more extensive analysis of an earlier memorandum and order in the case of *United States* v. *King*, No. H-06-0363 (S.D. Tex. July 10, 2007). App., *infra*, 6a-14a; see *id.* at 5a.

out use of 'destructive or violent force,'" such as "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* at 879.

The *Villegas-Hernandez* court acknowledged that *Shelton* had earlier held that Texas Penal Code § 22.01(a)(1) had a use-of-force element for purposes of the definition of "misdemeanor crime of violence" in Section 921(a)(33)(A). 468 F.3d at 880. The court, however, declined to rely on *Shelton*. The court relied instead on an intervening en banc decision, *United States* v. *Vargas-Duran*, 356 F.3d 598 (5th Cir.), cert. denied, 541 U.S. 965, and 543 U.S. 995 (2004), in which the court held that the crime of driving under the influence and causing bodily injury is not a "crime of violence" under a similarly worded definition of the term in Sentencing Guidelines § 2L1.2. See Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)). In so holding, the en banc court in *Vargas-Duran* had explained that "[t]here is . . . a difference between a defendant's causation of an injury and the defendant's use of force." *Villegas-Hernandez*, 468 F.3d at 880 (quoting *Vargas-Duran*, 356 F.3d at 606).

The *Villegas-Hernandez* court also acknowledged that the defendant in that case had been charged with and admitted to hitting a family member. It held, however, that it could not rely on the charging document or plea-colloquy admission to conclude that the defendant had been convicted of an assault offense involving the use of force. 468 F.3d at 882-883; see, *e.g.*, *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2302-2303 (2009) (describing the so-called modified categorical approach, which permits courts to consult certain judicial records to narrow the basis for a defendant's conviction under a criminal statute that sweeps more

broadly than a generic federal definition). The court explained that, "if statutory language is wholly result-oriented, as here, an offense is not a crime of violence under subsection 16(a) simply because an indictment or information describes force being used in a particular commission of that offense." *Villegas-Hernandez*, 468 F.3d at 883.

Concluding that *Villegas-Hernandez* resolved the issue, the district court in this case agreed with respondent that his conviction under Texas Penal Code § 22.01(a)(1) did not qualify as a predicate "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9). App., *infra*, 5a. The court accordingly dismissed the indictment. *Ibid.*

4. The United States appealed and sought initial hearing en banc, but the court of appeals denied en banc review. App., *infra*, 15a-16a. The court of appeals then affirmed in an unpublished ruling. *Id.* at 1a-2a. In a per curiam order, the court held that the district court had correctly relied on *Villegas-Hernandez* in concluding that assault in violation of Texas Penal Code § 22.01(a)(1) does not qualify as a "misdemeanor crime of domestic violence" under Section 922(g)(9). *Id.* at 2a. The United States sought en banc rehearing, but the court declined to reconsider its decision. *Id.* at 17a-18a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit has concluded that a person convicted of misdemeanor assault by causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9), because, in the court's view, it is possible to cause bodily injury without "us[ing] * * * physical force" against the victim. 18 U.S.C. 921(a)(33)(A)(ii). That conclusion misinterprets the statute. It disregards the statute's language, overlooks its common-law background, and elevates hypothetical exam-

ples over prototypical applications of the covered offense. The decision also conflicts with the decisions of other courts of appeals to address the issue. If left unreviewed, the court's decision threatens to impede effective and uniform enforcement of Section 922(g)(9), since domestic abusers are routinely prosecuted under assault and battery statutes that punish the causation of bodily injury without specifying the means by which the victim's injury must have been caused. This Court's review is warranted.

A. The Decision Below Incorrectly Constricts The Scope Of Section 922(g)(9)

In Section 922(g)(9), Congress extended the longstanding federal prohibition on firearm possession by any person convicted of a felony, 18 U.S.C. 922(g)(1), to persons convicted of "misdemeanor crime[s] of domestic violence." See *United States* v. *Hayes*, 129 S. Ct. 1079, 1082 (2009). Congress defined the term "misdemeanor crime of domestic violence" to mean an offense that is a misdemeanor under state, federal, or tribal law, that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by" a person with a specified domestic relationship with the victim. 18 U.S.C. 921(a)(33)(A); see *Hayes*, 129 S. Ct. at 1087.

The court of appeals in this case concluded that the federal prohibition on firearm ownership by persons convicted of misdemeanor crimes of domestic violence had no application to an individual convicted of assaulting a family member by intentionally and knowingly causing her bodily injury.[3] The court relied on the view expressed in *United*

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[3] Although Texas Penal Code § 22.01(a)(1) also punishes any individual who "recklessly causes bodily injury to another," Tex. Penal Code Ann. § 22.01(a)(1) (West 2003), respondent was specifically charged with the intentional and knowing causation of bodily injury, see

States v. *Villegas-Hernandez*, 468 F.3d 874 (2006), cert. denied, 549 U.S. 1245 (2007), that bodily injury can be caused without the use of force—by, for example, "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* at 879; see App., *infra*, 2a. That analysis is seriously flawed in at least three respects.

1. First, as a matter of ordinary usage, the defendant's "use" of "physical force" is an "element" of the offense of assault by causing bodily injury because physical force is the means by which injury is necessarily produced. As the First Circuit reasoned in *United States* v. *Nason*, 269 F.3d 10 (2001), "to cause *physical* injury, force necessarily must be *physical* in nature." *Id.* at 20. A person who intentionally or knowingly causes injury to another must "use," or actively employ, physical force to achieve that result. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (explaining that the word "use" in the context of the definition of "crime of violence" in 18 U.S.C. 16(a) means "active employment") (citing *Bailey* v. *United States*, 516 U.S. 137, 144 (1995)). To convict a defendant of bodily-injury assault, the prosecution must therefore prove that the defendant used physical force against the victim.

As the court of appeals seems to have acknowledged, see *Villegas-Hernandez*, 468 F.3d at 882-883, a person employs physical force against another when he causes bodily injury by making direct physical contact with his victim—

App., *infra*, 19a. Respondent accordingly has conceded that Section 22.01(a)(1) "may, for present purposes, be 'pared down' to exclude consideration of the alternative *mens rea* of 'recklessly.'" Resp. C.A. Br. 8; see, *e.g.*, *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2302-2303 (2009) (describing the modified categorical approach).

for example, by striking her with his hand. But the same is true in the unusual cases that the court of appeals imagined in *Villegas-Hernandez*, in which the assailant causes physical harm without making direct physical contact. "If someone lures a poor swimmer into waters with a strong undertow in order that he drown, or tricks a victim into walking toward a high precipice so that he might fall," for example, the offender "has at least attempted to make use of physical force against the person of the target, either through the action of water to cause asphyxiation or by impact of earth on flesh and bone." *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). "However remote these forces may be in time or distance from the defendant, they were still directed to work according to his will, as surely as was a swung fist or a fired bullet." *Ibid.* (Smith, J., dissenting); cf., *e.g.*, *United States* v. *De La Fuente*, 353 F.3d 766, 770-771 (9th Cir. 2003) (concluding that a threat of anthrax poisoning qualifies as a "threatened use of physical force" under Section 16(a), and explaining that "the bacteria's physical effect on the body is no less violently forceful than the effect of a kick or a blow").

A contrary conclusion would lead to absurd consequences. Many States define a range of crimes against the person, from simple assault to murder, by specifying a particular result (*e.g.*, the causation of "bodily injury" or "death"), without explicitly specifying the means by which an offender must have achieved that result. See, *e.g.*, Ala. Code § 13A-6-2(a)(1) (LexisNexis Supp. 2009) ("A person commits the crime of murder if * * * [w]ith intent to cause the death of another person, he or she causes the death of that person or of another person."); Alaska Stat. § 11.41.100(a)(1) (2008) (similar); Ariz. Rev. Stat. Ann. § 13-1105(A)(1) (2010) (similar); Colo. Rev. Stat.

§ 18-3-102(1)(a) (2009) (similar); Conn. Gen. Stat. Ann. § 53a-54a(a) (West 2007) (similar). Many such offenses can be committed by means of subtle and indirect uses of physical force, as well as direct physical contact between the offender and the victim. See generally 2 Wayne R. LaFave, *Substantive Criminal Law* § 14.2(c), at 433 (2d ed. 2003) (LaFave) ("While the method of producing an intentional death is usually some weapon in the hands of the murderer, * * * sometimes more subtle means are used."). Yet under the court of appeals' analysis, even murder would not have as an element the use of force, since it can be accomplished through poisoning. See *Villegas-Hernandez*, 468 F.3d at 879.

Congress cannot have intended that result. Many federal crime-of-violence provisions, like Section 921(a)(33)(A), define predicate acts to include offenses that have as an element the use of physical force. See, *e.g.*, 18 U.S.C. 16(a) (defining "crime of violence"); *Leocal*, 543 U.S. at 7 (noting that Section 16 has been "incorporated into a variety of statutory provisions, both criminal and noncriminal"); 18 U.S.C. 373(a), 521(c)(2), 924(c)(3)(A), 924(e)(2)(B)(i); 20 U.S.C. 1161w(f)(3)(A)(ii) (Supp. II 2008); 28 U.S.C. 540A(c)(1). Congress undoubtedly intended the use-of-force language of those statutes to encompass quintessential violent crimes such as murder. An interpretation that excludes them is highly suspect. Cf. *Calderon-Pena*, 383 F.3d at 270-271 (Smith, J., dissenting) (noting that "it would be absurd" to believe that murder would not involve the "use of physical force" because "the crime of murder in many states may be satisfied by subtle and indirect uses of force").

2. The court of appeals' interpretation also conflicts with the "more specialized legal usage" of the phrase "use . . . of physical force" to describe the common-law crime

of battery. *Johnson* v. *United States*, 130 S. Ct. 1265, 1270-1271 (2010). Battery is defined, in language that tracks the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), as "the intentional application of unlawful force against the person of another." *Id.* at 1270. At common law, that phrase was understood to reach conduct resulting in either "a bodily injury or an offensive touching." 2 LaFave § 16.2, at 553; see *Johnson*, 130 S. Ct. at 1271. And as particularly relevant here, battery was understood to reach indirect as well as direct uses of force against the body of the victim. See 2 LaFave § 16.2, at 554; see also 2 Joel Prentiss Bishop, *Bishop on Criminal Law* § 72 *a* at 48-49 (John M. Zane & Carl Zollman eds., 9th ed. 1923) (discussing cases). A person thus committed a battery when, for example, he "administer[ed] a poison" or "[told] a blind man walking toward a precipice that all is clear ahead." 2 LaFave § 16.2, at 554-555; see also, *e.g.*, *State* v. *Monroe*, 28 S.E. 547 (N.C. 1897) (druggist who sold candy laced with sufficient croton oil to cause injury, knowing that the candy would be administered to another as a trick, was guilty of assault and battery); *Commonwealth* v. *Stratton*, 114 Mass. 303, 304-305 (1874) (defendant, who offered the victim figs that had been drugged without the victim's knowledge, was guilty of assault and battery); Rollin M. Perkins, *Non-Homicide Offenses Against the Person*, 26 B.U. L. Rev. 119, 122 (1946) (explaining that battery, "an application of force to the person of another," may be committed by, *inter alia*, "threatening sudden violence and thereby causing another to jump from a window or a moving vehicle or other place") (footnote omitted).

This Court has recognized that, when Congress uses a term having an established common-law meaning, it ordinarily intends the term to bear that common-law meaning. See, *e.g.*, *Johnson*, 130 S. Ct. at 1270 (citing *United States*

v. *Turley*, 352 U.S. 407, 411 (1957)). Here, where Congress has employed the common-law definition of misdemeanor battery to define the term "misdemeanor crime of domestic violence," the most natural conclusion is that Congress intended to describe generic, common-law battery crimes, including crimes involving the causation of bodily injury by subtle and indirect uses of physical force. Cf. *id.* at 1271-1272.[4]

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[4] In *Johnson*, the Court considered whether the Florida felony offense of recidivist battery, defined in part as intentionally touching or striking another person against her will, qualified as a "violent felony" under the provision of the Armed Career Criminal Act of 1984 (ACCA) that covers crimes that "ha[ve] as an element the use * * * of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i). The Court acknowledged that, at common law, the "force" element of battery was "satisfied by even the slightest offensive touching." *Johnson*, 130 S. Ct. at 1270. The Court concluded, however, that the common-law meaning of the term "force" was not controlling because that meaning "does not fit" in the context of the ACCA's definition of the term "violent felony." *Ibid.* The Court reasoned that the term "violent," particularly when "attached to the noun 'felony,'" connotes "strong physical force." *Id.* at 1271. The Court also considered it "unlikely" that Congress would employ the common-law definition of battery—a crime punishable as a misdemeanor at common law, and still generally punishable as a misdemeanor today—in defining the term "violent *felony*." *Id.* at 1271-1272 (emphasis added).

The Court in *Johnson* reserved the question whether the term "physical force" has the same meaning in the context of Section 922(g)(9)'s definition of "misdemeanor crime of domestic violence." 130 S. Ct. at 1273. Since then, one court of appeals has relied on *Johnson* to conclude that a conviction for common-law battery of a family member does not qualify as a "misdemeanor crime of domestic violence" because that offense need not have involved the use of "violent force." *United States* v. *White*, No. 09-4114, 2010 WL 2169487 (4th Cir. June 1, 2010). The government disagrees with that extension of *Johnson*, and the Acting Solicitor General has authorized the filing of a petition for rehearing. This case, however, provides no occasion to consider that question. The

3. In any event, even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect and subtle uses of physical force, the court of appeals identified no evidence that Texas Penal Code § 22.01(a)(1) would be applied in that manner. See *United States* v. *Shelton*, 325 F.3d 553, 561 (5th Cir.) (noting "the absence of a Texas case that indicates that a defendant could be convicted of misdemeanor assault for causing bodily injury without using physical force"), cert. denied, 540 U.S. 916 (2003), and 543 U.S. 1057 (2005). Rather than cite cases, the *Villegas-Hernandez* court simply hypothesized that Section 22.01(a)(1) could be used to punish individuals who lured their victims into harm's way.

The court of appeals' approach is inconsistent with this Court's guidance. In *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), this Court made clear that "to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language"; it requires a "realistic probability," and not just a "theoretical possibility," that the state statute would be applied in a "nongeneric" way. *Id.* at 193. To establish the requisite probability, this Court instructed that an offender "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Ibid.*

Texas bodily-injury assault offense at issue in this case categorically involves "violent force" as this Court interpreted the term in *Johnson*: that is, "force capable of causing physical pain or injury to another person." 130 S. Ct. at 1271; see Tex. Penal Code Ann. § 1.07(a)(8) (West 2003) (defining the term "[b]odily injury," as required by Section 22.01(a)(1), to mean "physical pain, illness, or any impairment of physical condition").

Here, respondent could not contend that he was convicted under Texas Penal Code § 22.01(a)(1) for conduct not involving the use of physical force. See App., *infra*, 19a. And the Fifth Circuit has identified no case in which Texas's assault statute has been applied to conduct of the sort it imagined in *Villegas-Hernandez*. The court erred by relying on nothing more than highly stylized hypothetical applications of the statute to hold that Texas bodily-injury assault on a family member is not a "misdemeanor crime of domestic violence" under Section 922(g)(9).

B. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The court of appeals' conclusion that misdemeanor assault by causing bodily injury to a family member is not a "misdemeanor crime of domestic violence" squarely conflicts with the decisions of other courts of appeals. Both the First and the Eighth Circuits have held, in decisions contrary to the decision below, that bodily-injury assault qualifies as a "misdemeanor crime of domestic violence" within the meaning of Section 921(a)(33)(A). See *Nason*, 269 F.3d at 12, 20 (holding that the provision of the Maine assault statute that prohibits "intentionally, knowingly, or recklessly caus[ing] bodily injury . . . to another," "unambiguously involves the use of physical force" within the meaning of Section 921(a)(33)(A)(ii)); *United States* v. *Smith*, 171 F.3d 617, 620-621 (8th Cir. 1999) (holding that the provision of the Iowa assault statute that prohibits "[a]ny act which is intended to cause pain or injury to * * * another," Iowa Code § 708.1(2) (West 1993), has a use-of-force element within the meaning of Section 921(a)(33)(A)(ii)).[5] The Fifth

[5] The First Circuit in *Nason* cited a Maine Supreme Court decision describing the bodily-injury provision of Maine's assault statute as reaching the "use of unlawful force against another causing bodily in-

Circuit had relied in part on those decisions in its earlier decision in *Shelton*, 325 F.3d at 558-559, in which it had concluded that a violation of Texas Penal Code § 22.01(a)(1) does qualify as a "misdemeanor crime of domestic violence." By reversing course here, the Fifth Circuit has brought itself into direct conflict with the First and Eighth Circuits.

The court of appeals' decision is, on the other hand, consistent with the Second Circuit's construction of a parallel provision of law. See *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 194-196 (2003) (holding that assault by intentionally causing physical injury to another "does not necessarily involve the use of force" for purposes of 18 U.S.C. 16(a) because a defendant could be convicted "for injury caused not by physical force, but by guile, deception, or even deliberate omission").[6]

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jury." *Nason*, 269 F.3d at 20 (quoting *State* v. *Griffin*, 459 A.2d 1086, 1091 (Me. 1983)). The court in *Griffin* did not, however, suggest that bodily-injury assault under Maine law is limited to some acts involving the intentional or knowing infliction of bodily injury but not others, and the conclusion that all such acts involve the "use of unlawful force" is consistent with the prevailing use of that phrase in describing the common-law crime of battery. See pp. 10-12, *supra*.

[6] In addition, courts have reached conflicting results under Sentencing Guidelines provisions that classify offenses by reference to the use of force. Compare, *e.g.*, *United States* v. *Alexander*, 543 F.3d 819, 823 (6th Cir. 2008) (concluding that the element of causing bodily injury under Michigan's resisting-arrest statute involves the "use of physical force against the person of another" within the meaning of Sentencing Guidelines § 4B1.2(a)(1)), cert. denied, 129 S. Ct. 2175 (2009), with *United States* v. *Perez-Vargas*, 414 F.3d 1282, 1285-1287 (10th Cir. 2005) (holding that assault by knowingly or recklessly causing bodily injury to another, Colo. Rev. Stat. § 18-3-204(1)(a) (1986), does not have a use-of-force element for purposes of Sentencing Guidelines § 2L1.2 because defendants could be convicted for acts such as "intentionally placing a

The division in authority is unlikely to be resolved without this Court's intervention. The government twice in this case sought en banc review in the Fifth Circuit and that court declined to reconsider its position. The division is of particular practical significance because it means that application of Section 922(g)(9) to a particular individual will vary depending on the State he or she resides. If, for example, respondent were to move from Texas to Missouri, the same assault conviction held insufficient in the Fifth Circuit would bar respondent from possessing firearms in the Eighth Circuit. This Court's review is warranted.

C. The Question Presented Is Of Recurring Importance

Review is also warranted because the question is one of recurring importance in federal prosecutions and to the administration of a significant federal law.

1. Congress enacted Section 922(g)(9) to provide a nationwide solution to what it regarded as a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. *Hayes*, 129 S. Ct. at 1087. When Congress enacted Section 922(g)(9) in 1996, "domestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws." *Ibid.* Many States, following the Model Penal Code's approach, define the crime of assault as the unlawful causation of bodily injury. See Model Penal Code § 211.1(1) (1985); see also, *e.g.*, Conn. Gen. Stat. Ann. § 53a-61(a) (West 2007); Del. Code Ann. tit. 11, § 611 (2007). And many more States, following the common-law approach, define assault or battery as involving either the causation of bodily injury or offensive physical contact. See, *e.g.*, Fla. Stat. Ann. § 784.03(1)(a) (West 2007); 720 Ill. Comp. Stat. Ann.

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barrier in front of a car causing an accident, or intentionally exposing someone to hazardous chemicals").

5/12-3(a)(1) (West 2002). As a consequence, in much of the country, the intentional or knowing causation of bodily injury, without more, is punishable as simple assault or battery.

If, as the court of appeals concluded, convictions under such injury-focused statutes do not have as an element the use of physical force, then it is likely that Section 922(g)(9) will have no application to many persons convicted of misdemeanor domestic-violence crimes in much of the country. Congress would not have intended that result. See *Hayes*, 129 S. Ct. at 1087-1088 (rejecting an interpretation of Section 921(a)(33)(A) that would have rendered Section 922(g)(9) "'a dead letter' in some two-thirds of the States from the very moment of its enactment") (citation omitted); see also *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2302 (2009) (rejecting a reading of 8 U.S.C. 1101(a)(43)(M)(i) that would leave the provision with little application, doubting "Congress would have intended (M)(i) to apply in so limited and so haphazard a manner"); *Taylor* v. *United States*, 495 U.S. 575, 594 (1990) (declining to construe the Armed Career Criminal Act's reference to "burglary" as meaning "common-law burglary," explaining that such a construction "would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within the common-law definition"). This Court's review is warranted to forestall that dramatic curtailment of the statute.

2. The Fifth Circuit's erroneous interpretation of the use-of-force language common to Section 921(a)(33)(A) and other federal crime-of-violence definitions is likely significantly to impede enforcement of Section 922(g)(9) in that circuit. Two of the three States within the Fifth Circuit's jurisdiction punish the unlawful causation of bodily injury, without more, as simple assault. Miss. Code Ann.

§ 97-3-7(1)(a) (West Supp. 2009); Tex. Penal Code Ann. § 22.01(a)(1) (West 2003). The third State, Louisiana, defines simple battery as "the intentional use of force or violence upon the person of another; or the intentional administration of a poison or other noxious liquid or substance to another." La. Rev. Stat. Ann. § 14.33 (2007); cf. *Villegas-Hernandez*, 486 F.3d at 879 (suggesting that assault by poisoning would not qualify as a "misdemeanor crime of domestic violence").

The practical effects of the Fifth Circuit's interpretation are not mitigated by the availability of the so-called modified categorical approach, cf. *Johnson*, 130 S. Ct. at 1273, because the *Villegas-Hernandez* court concluded that the Texas offense of assault by causing bodily injury cannot be narrowed by reliance on charging documents and plea-colloquy admissions describing the offense as one involving the use of force, see 468 F.3d at 882-883. Resort to the modified categorical approach would not in any event offer a full response to the practical difficulties associated with the court of appeals' approach, since charging documents often simply track the language of the statute and do not as a general rule set forth a specific factual recitation of the means by which the defendant committed his crime. Cf. *Johnson*, 130 S. Ct. at 1273 (acknowledging that "in many cases state and local records from battery convictions will be incomplete"); *id.* at 1278 (Alito, J., dissenting) (noting it "will often be impossible" to employ the modified categorical approach to narrow the basis of a particular battery conviction).

3. The conflict among the circuits is likely to prove a source of confusion for defendants as well. Defendants with convictions like respondent's may not be subject to federal prosecution for possession of firearms when they live in the jurisdiction of the Fifth Circuit but can be prosecuted if

they later move to a State within the jurisdictions of the First or Eighth Circuits—and they will be uncertain about their status in other jurisdictions.

The conflict will also have an adverse impact on officials reviewing the lawfulness of certain firearms purchases by out-of-state buyers. See 18 U.S.C. 922(s)-(t). Because of the conflict, officials will have to consider not only the whether the transaction complies with the law of the State in which the transaction occurs, but also whether buyers are permitted to possess firearms under the interpretation of Section 921(a)(33)(A) prevailing in their State of residence—an interpretation that may or may not be consistent with the interpretation prevailing in the State in which the transaction occurs. See 18 U.S.C. 922(a)(3) and (b)(3).

For all of these reasons, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20798

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

REGINALD KEITH HAGEN, DEFENDANT-APPELLEE

[Filed: Oct. 14, 2009]

Appeal from the United States District Court for the Southern District of Texas (4:07-CR-222-ALL)

Before: HIGGINBOTHAM, and STEWART, Circuit Judges, and FELDMAN, District Judge.*

PER CURIAM:**

On May 31, 2007, Reginald Keith Hagen was charged with possession of firearms and making false statements or representations to a licensed firearms dealer in violation of Title 18 U.S.C. §§ 922(g)(9), 924(a)(2), 922(a)(6),

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* District Judge, Eastern District of Louisiana, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

924(a)(2) and 924(a)(1)(A). The government alleged that Hagen had been convicted of a misdemeanor crime of domestic violence, and as a result made a false statement on ATF Form 4473 in order to purchase two firearms.

Hagen moved to dismiss the indictment on the grounds that he was convicted for "assault of a family member" under Texas Penal Code § 22.01(a)(1) and (b)(2) which he argues does not qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A). The district court granted the motion. The district court relied on this court's ruling in *United States v. Villegas-Hernandez*,[1] in deciding to not follow *United States v. Shelton*.[2] We agree with the district court and AFFIRM the dismissal of the indictment.

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[1] 468 F.3d 874 (5th Cir. 2006).

[2] 325 F.3d 553 (5th Cir. 2003).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-07-222

UNITED STATES OF AMERICA, PLAINTIFF

v.

REGINALD KEITH HAGEN, DEFENDANT

Sept. 27, 2007

ORDER OF DISMISSAL

I.

Before the Court is the defendant, Reginald Keith Hagen's, motion to dismiss the indictment [#11] against him. Also before the Court are the government's response [#17], and memorandum and the defendant's reply. After a review of the documents, the case law presented and the arguments of counsel, the Court determines that the motion is meritorious and should be granted.

II.

In a four count indictment filed on May 31, 2007, the defendant was charged with possession of firearms and making false statements or representations

to a licensed firearms dealer in violation of Title 18 U.S.C. §§ 922(g)(9), 924(a)(2), 922(a)(6), 924(a)(2) and 924(a)(1)(A). The government alleges that the defendant had been convicted of a misdemeanor crime of domestic violence, and as a result made a false statement on ATF Form 4473 in order to purchase two (2) firearms.

III.

The defendant argues that the determination of whether the defendant committed any offense turns on the Court and Fifth Circuit Court's interpretation of Tex. Pen. Code § 22.01(a)(1) and (b)(2), which statute charges the offense of "assault of a family member." For federal prosecution purposes, the question is whether the defendant's conviction for the offense of "assault of a family member" qualifies as a "misdemeanor crime of domestic violence" under federal law. *See* 18 U.S.C. § 921(a)(33)(A). In this regard, the defendant argues that both this Court and the Circuit Court have addressed this very issue. The defendant cites to *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006) and *United States v. David Ray King*, (Criminal No. 06-0363, 2007). Finally, the defendant points out that the Circuit Court in *Villegas-Hernandez* acknowledges that it rejected its holding in *United States v. Shelton*, 325 F.3d 553 (5th Cir. 2003), while sitting *en banc* in *United States v. Vargas-Duran*, 319 F.3d 194 (5th Cir. 2003).

IV.

The government argues that what is at issue is the Circuit Court's definition of "use of force" under Title 18. In this regard, the government argues that Circuit

Court has fashioned a definition that is too narrow and ignores Congress' intent to broaden the scope of Section 921(a)(33)(A) to include misdemeanor crimes of violence not simply crimes of violence. In this regard, the government argues that *United States v. Shelton*, 325 F.3d 553 (5th Cir. 2003) is still the law. The government argues that in *Shelton*, the Circuit Court held that a prior conviction under Texas statute § 22.01(a)(1) is a misdemeanor crime of domestic violence and, therefore, fits the definition set out in Title 18 U.S.C. § 922(a)(33).

V.

The Court is of the opinion that this issue was addressed in *Villegas-Hernandez* and locally in *David Ray King*. Therefore, the Court will not further reason between the defendant and the government, but instead, adopt the analysis in *David Ray King*. Having done so, the Court DISMISSES the indictment in this case.

It is so Ordered.

SIGNED and ENTERED this 27th day of September, 2007.

/s/ KENNETH M. HOYT
KENNETH M. HOYT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal No. H-06-0363

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH ANDERSON, JR. AND DAVID RAY KING,
DEFENDANTS

July 10, 2007

MEMORANDUM AND ORDER

Before the Court is Defendant David Ray King's Motion to Dismiss Count One of the Indictment. After considering the parties' filings and the relevant law, the Court finds that the motion, Docket No. 22, should be **GRANTED**.

I. BACKGROUND

On October 4, 2006, a two-count indictment was filed against Defendant David Ray King.[1] King pled guilty to Count Two (unlawful possession of an unregistered fire-

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[1] King's co-Defendant, Kenneth Anderson, was indicted on three counts.

arm and aiding and abetting, in violation of 26 U.S.C. §§ 5861(d) and 5871, and 18 U.S.C. § 2) on February 16, 2007.[2] Defendant moves to dismiss Count One of the indictment, which alleges that Defendant, having been convicted of a misdemeanor crime of domestic violence, aided and abetted and knowingly possessed a firearm in violation of 18 U.S.C. §§ 922(g)(9), 924(a)(2), and 2. Defendant argues that his prior conviction for assault of a family member does not constitute a crime of violence.

II. ANALYSIS

Under 18 U.S.C. § 922(g)(9), "[i]t shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(9) (2006). A misdemeanor crime of domestic violence is a misdemeanor under federal, state, or tribal law that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon," committed on a current or former family member or domestic partner. 18 U.S.C. § 921(a)(33)(A).

On February 28, 2006, Defendant King was convicted of and sentenced to probation for assault on a family member, in Fayette County, Texas. King was convicted under the Texas assault statute, which provides that "[a] person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." TEX. PENAL CODE ANN.

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[2] King was sentenced as to Count Two on July 6, 2007.

§ 22.01(a)(1) (Vernon 2007). Defendant argues that a violation of Section 22.01(a)(1) does not categorically constitute a crime of violence;[3] and therefore does not trigger 18 U.S.C. § 922(g)(9).

The Fifth Circuit has addressed on numerous occasions whether particular offenses, including violations of Texas Penal Code § 22.01(a)(l), count as crimes of violence. The government points the Court to *United States v. Shelton*, 325 F.3d 553 (5th Cir. 2003), in which the Fifth Circuit held that because Section 22.01(a)(l) requires proof of bodily injury, it has as an element the use of force, and a conviction under the statute is a crime of violence triggering Section 922(g)(9). *Id.* at 561. Defendant counters that intervening *en banc* authority has effectively overruled *Shelton*, and that under *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), an assault conviction under Section 22.01(a)(l) no longer counts categorically as a crime of violence. The precise question before the Court, then, is whether *Shelton* is still good law, or whether it has been overruled by the Fifth Circuit sitting *en banc*. *See, e.g.*, *Foster v. Quarterman*, 466 F.3d 359, 367-68 (5th Cir. 2006) ("Absent an en banc, or intervening Supreme Court, decision, one panel of this court may not overrule a prior panel's decision."). Given the admittedly complicated state of the case law, the Court feels compelled briefly to review the relevant precedents.

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[3] The Court must use a categorical analysis, which looks only to the language of the relevant statute, not at Defendant's underlying conduct. *E.g.*, *United States v. Bonilla-Mungia*, 422 F.3d 316, 320 (5th Cir. 2005). Therefore, regardless of Defendant's actions giving rise to the 2006 conviction, the Court must determine whether all possible violations of the Texas assault statute would constitute crimes of violence, as defined by 18 U.S.C § 921(a)(33)(A).

Vargas-Duran I

In January 2003, the Fifth Circuit examined whether a state court conviction for intoxication assault qualified as a "crime of violence" for the purpose of a sentence enhancement under Section 2LI.2(b)(1)(A)(ii) of the 2001 United States Sentencing Guidelines. *United States v. Vargas-Duran*, 319 F.3d 194 (5th Cir. 2003) (*Vargas-Duran I*). Under the 2001 version of Section 2LI.2, an offense counted as a "crime of violence" if it had "as an element the use, attempted use, or threatened use of physical force against the person of another." *Id.* at 196. The Texas intoxication assault statute then in effect provided that a defendant was guilty of a third degree felony if he or she "by accident or mistake, while operating an aircraft, watercraft, or motor vehicle in a public place while intoxicated, by reason of that intoxication cause[d] serious bodily injury to another." *Id.* at 196 n.3. The Fifth Circuit held that 1) because the intoxication assault statute requires bodily injury, it has as an element the use of force; and 2) Section 2L1.2 does not incorporate an intentionality or state of mind requirement in order for an offense to constitute a crime of violence. *Id.* at 196, 199.

United States v. *Shelton*

Two months later, the Fifth Circuit addressed precisely the same circumstances presented by the instant case: a challenge to a conviction under 18 U.S.C. § 922(g)(9), on the basis that an assault conviction under Section 22.01(a)(l) of the Texas Penal Code did not qualify as a crime of violence. Citing the reasoning of *Vargas-Duran I*, the *Shelton* Court held that because Section 22.01(a)(1) "requires bodily injury it includes as an element the use of physical force." *Shelton*, 325 F.3d

at 561. The Fifth Circuit acknowledged that "*Vargas-Duran* is not on all fours with Shelton's case . . . [but] the discussion certainly informs the instant question." *Id.* at 558.

Vargas-Duran II

In 2004, the Fifth Circuit, sitting *en banc*, reexamined *Vargas-Duran I*. *United States* v. *Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (*Vargas-Duran II*). The Court disagreed with the original panel holding regarding intentionality, concluding that a predicate offense triggering a sentence enhancement under Section 2L1.2 of the Guidelines "requires that a defendant intentionally avail himself of that force." *Id.* at 602. Because the Texas intoxication assault statute applied explicitly to conduct that occurred "by accident or mistake," the intentional use of force was "simply not an element" of the statute, and an intoxication assault conviction could not categorically qualify as a crime of violence. *Id.* at 605.

The Court also opined, however, that "the fact that the statute requires that serious bodily injury result from the operation of a motor vehicle by an intoxicated person does not mean that the statute requires that the defendant have used the force that caused the injury. All that the statute requires is that a bodily injury occur and that the injury was causally linked to the conduct of the defendant. . . . There is [] a difference between a defendan's causation of an injury and the defendant's use of force. Consequently, Vargas-Duran's use of force was simply not a fact necessary to support his conviction for intoxication assault." *Id.* at 606. In other words, even apart from the intentionality issue, there could conceivably be ways of violating the intoxication assault statute (and causing serious bodily injury) without using

force, since the statute explicitly requires only proof of injury, not proof of force. For that reason, the Court found that intentional use of force was not an element of the statute.

Section 22.01(a)(1) of the Texas assault statute similarly requires only that a defendant "intentionally, knowingly, or recklessly cause[] bodily injury to another," and does not specify that force is actually used. Therefore, the holding of *Vargas-Duran II*, which distinguishes causation of injury from use of force, seems to be at odds with *Shelton*, which reasons that the requirement to show injury under Section 22.01(a)(1) necessarily signifies that force was used. Furthermore, the *Vargas-Duran II* panel approvingly cited a Second Circuit case finding that "just as risk of injury does not necessarily involve the risk of the use of force, the intentional causation of injury does not necessarily involve the use of force." *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003); *see also Vargas Duran II*, 356 F.3d at 605 n.10. *Vargas-Duran II* nowhere cites or even mentions *Shelton*, however, leaving ambiguous the issue of whether or not it actually overruled that case.

United States v. Villegas-Hernandez

A recent Fifth Circuit opinion, on which Defendant urges the Court to rely, clearly views *Shelton* as questionable at best in light of *Vargas-Duran II*. *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006). In *Villegas-Hernandez*, the Fifth Circuit again asked whether a conviction for assault under Section 22.01(a)(1) qualifies as a crime of violence, in that case for the purpose of a sentence enhancement under 2L1.2(b)(1)(C) of the Sentencing Guidelines. According to the *Villegas-Hernandez* Court, a crime of violence

under Section 2L1.2 must involve force that is not only *intentional*, but also "destructive or violent." *Id.* at 879. In examining the language of Section 22.01(a)(1), however, the Court found that "[t]he bodily injury required by Section 22.01(a)(1) . . . could result from any of a number of acts, without use of 'destructive or violent force' . . . Thus, use of force is not an element of assault under Section 22.01(a)(1), and the assault offense does not fit [the relevant] definition for crime of violence." *Id.* For example, a defendant could violate the assault statute without force by "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id.* These acts, the *Villegas-Hernandez* panel reasoned, would violate the assault statute, but would not involve force. Therefore, a conviction under Section 22.01(a)(1) cannot categorically be qualified as a "crime of violence."

The panel recognized that its holding directly conflicts with *Shelton*. *Id.* at 880. In examining earlier case law, the panel noted *Vargas-Duran II* and its citation of *Chrzanoski*, and wrote that "[b]ecause the en banc opinion in *Vargas-Duran* comes after *Shelton*, which is itself a panel opinion, and because of *Shelton's* heavy reliance on the panel opinion in *Vargas-Duran* which was later reversed en banc, we feel compelled to decide [the instant case] on the basis of the principles set down in *Vargas-Duran* and *Calderon-Pena* rather than in reliance on *Shelton*. On this basis we conclude that although Section 22.01(a)(l) requires that the defendant 'intentionally, knowingly, or recklessly cause[s] bodily injury to another,' that section may be violated by the

defendant so causing such injury by means *other than* the actual, attempted, or threatened 'use of physical force against the person of another,' and hence does not have such use of force as an element . . . ". *Id.* at 882. Therefore, although *Vargas-Duran II* did not explicitly overrule *Shelton*, and without saying outright that it had, the *VillegasHernandez* panel treated *Shelton* for all intents and purposes as overruled.

The government argues essentially that the analysis of the *Villegas-Hernandez* panel was incorrect, and that *Vargas-Duran II* left *Shelton* intact. In the face of two conflicting holdings (*Villegas-Hernandez* and *Shelton*), then, this Court would be obliged to follow the older opinion. *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991). In the Court's view, however, the teachings of the *en banc* opinion in *Vargas-Duran II* contradict the teachings of *Shelton* to such an extent that *Shelton* is no longer good law.

It is true that the principal holding of *Vargas-Duran II* (regarding the intentionality requirement) is inapplicable to the assault statute examined in *Shelton*, *Villegas-Hernandez*, and the instant case. The Court finds it impossible, however, to disregard the language in *Vargas-Duran II* on the question of whether causation of a bodily injury necessarily signifies the use of force, which is squarely at issue in examining the Texas assault statute. In *Vargas-Duran II*, the Fifth Circuit sitting *en banc* found that because there is a difference between a defendant's causation of an injury and the defendant's use of force, "Vargas-Duran's use of force was simply not a fact necessary to support his conviction for intoxication assault." *Vargas-Duran II*, 356 F.3d at 606. This conclusion appears from all angles to be a holding,

not merely dicta, and the Court must recognize its applicability to the assault statute, which similarly requires only causation of "bodily injury," rather than proof that force was actually used. Regardless of whether the *Vargas-Duran II* Court explicitly mentioned *Shelton*, it eviscerated *Shelton's* central holding. For this reason, and until the Fifth Circuit provides clearer guidance on the issue, the Court believes that the most correct course is to treat *Shelton* as overruled.

Therefore, the Court follows *Vargas-Duran II* and *Villegas-Hernandez* in finding that Defendant's conviction for assault under Texas Penal Code § 22.01(a)(1) does not constitute a crime of violence. Because there is no predicate offense, Count One of the indictment, alleging a violation of 18 U.S.C. § 922(g)(9), must be dismissed.

III. CONCLUSION

Defendant's Motion to Dismiss Count One of the Indictment is hereby **GRANTED**.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 10th day of July, 2007.

/s/ KEITH P. ELLISON
KEITH P. ELLISON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20798

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

REGINALD KEITH HAGEN, DEFENDANT-APPELLEE

[Filed: July 27, 2009]

Appeal from the United States District Court for the Southern District ofTexas, Houston

---

ON MOTION FOR HEARING EN BANC

Before: JOLLY, BENAVIDES, and HAYNES, Circuit Judges

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Hearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Motion for Hearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not

having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Motion for Hearing En Banc is DENIED.

ENTERED FOR THE COURT:

ILLEGIBLE
United States Circuit Judge

Order on mot for hearing En Banc-REHGS

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20798

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

REGINALD KEITH HAGEN, DEFENDANT-APPELLEE

[Filed: Mar. 3, 2010]

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir. _____, _____, F.3d _____)

Before: HIGGINBOTHAM, and STEWART, Circuit Judges, and FELDMAN, District Judge.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having re-

---

* District Judge, Eastern District of Louisiana, sitting by designation

quested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

ILLEGIBLE
United States Circuit Judge

Order on pet EB treat as pan reh-REHG6A

(6) (4)

THE STATE OF TEXAS
VS.

REGINALD KEITH HAGAN, JR.
[redacted]

SPN: [redacted]
DOB: BM [redacted]
DATE PREPARED: 4/26/2005

D.A. LOG NUMBER: [redacted]
CJIS TRACKING NO.: [redacted]
BY: [redacted] DA NO: [redacted]
AGENCY: HPD
OR NO: [redacted]
ARREST DATE: 4/26/05

NCIC CODE: 1314 20 RELATED CASES:

MISDEMEANOR CHARGE: ASSAULT - FAMILY MEMBER

CAUSE NO: 1299687

BAIL: $2,000
PRIOR CAUSE NO:

HARRIS COUNTY CRIMINAL COURT AT LAW NO: 6
FIRST SETTING DATE: 05 03 2005

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

Comes now the undersigned Assistant District Attorney of Harris County, Texas on behalf of the State of Texas, and presents in and to the County Criminal Court at Law No. 6 of Harris County, Texas, that in Harris County, Texas, REGINALD KEITH HAGAN, JR., hereafter styled the Defendant, heretofore on or about APRIL 26, 2005, did then and there unlawfully, intentionally and knowingly cause bodily injury to RHONDA DORSEY-HAGAN, a member of the Defendant's FAMILY, and hereafter styled the Complainant by STRIKING THE COMPLAINANT ON THE HEAD WITH THE DEFENDANT'S HAND.

Before the commission of the offense alleged above, on MAY 1, 2001, in Cause No. 1051633 in the COUNTY CRIMINAL COURT AT LAW NO. 14 of HARRIS County, Texas, the Defendant was convicted of the MISDEMEANOR OFFENSE OF UNLAWFULLY CARRYING A WEAPON.

DUPLICATE

05 APR 27 11:48 AM

GOVERNMENT EXHIBIT 2 H-07-222

AGAINST THE PEACE AND DIGNITY OF THE STATE.

[redacted]
ASSISTANT DISTRICT ATTORNEY
OF HARRIS COUNTY, TEXAS.

24023778
BAR CARD NO.

INFORMATION

IMAGED

APPENDIX F

19a

JUDGMENT ON REVOCATION OF COMMUNITY SUPERVISION
REFORMED/NON-REFORMED

CAUSE NO. 1299687

THE STATE OF TEXAS

VS.

Reginald Keith Hagan Jr
(Name of Defendant)

IN THE COUNTY CRIMINAL COURT AT LAW NO. 6

OF HARRIS COUNTY, TEXAS

AKA —

Date of Judgment: DEC 16 2005 | Date Sentence Imposed: DEC 16 2005 | Sentence to Begin: DEC 16 2005 | Date of Offense: 4-36-05

Attorney for State: J Hill | Date of Original Community Supervision: 8-11-05

Attorney for Defendant: Caroline | ☐ Defendant Waived Counsel

Offense: Assault family member

DUPLICATE

A MISDEMEANOR, CLASS (A) | B | C

Original Punishment Assessed: 1 days/months/years Harris County Jail | Fine: $ 2

Plea: (TRUE) | NOT TRUE

Punishment Imposed and Place of Confinement: 60 days

(Mark all that apply)

☒ Reformed

☒ Harris County Jail

☒ SEE SPECIAL INSTRUCTIONS, incorporated herein by reference.

Fine in the Amount of $: —

☐ Fine Only

Time Credited: — days toward incarceration | — days toward fine and costs | 4 days toward incarceration, fine and costs | COURT COSTS: $ 0

(Mark appropriate selections below, if applicable)

☐ Name changed from —

☐ Judgment Addendum incorporated herein by reference.

☐ Driver's license is suspended for a period of — days/months/years.

☐ The Defendant is entitled to 4 days credit toward suspension of driver's license.

☐ It is ordered by the Court, that any weapon(s) seized in this case is/are hereby forfeited.

GOVERNMENT EXHIBIT 1 H-07-221

On this day came on to be heard in Harris County, Texas, unless otherwise referenced, the matter of the Defendant's obedience to the terms and conditions of probation heretofore granted in the above styled and numbered cause; the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above; or the Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel as indicated above in writing in open court, and both parties announced ready for trial.

RECORDER'S MEMORANDUM
This instrument is of poor quality at the time of imaging

After the Court heard the Defendant's above indicated plea and the evidence offered by the State of Texas and/Defendant herein, and having considered the same, finds that on the date of community supervision, as indicated above, the Defendant was convicted in this cause of the offense indicated above, and his punishment assessed as indicated above; however, the imposition of sentence was suspended and the defendant was placed on community supervision for a period of 7 DAYS/MONTHS/YEARS, and that within the period of such community supervision, the defendant violated the terms and conditions of said community supervision as set out in the State's ORIGINAL/~~AMENDED~~ Motion to Revoke the Community Supervision in that:

Commit no offense
pay fine & court cost
pay lab fee

IT IS ORDERED AND ADJUDGED by the Court that the community supervision heretofore granted the Defendant in this cause be, and the same is hereby revoked; that the finding of guilt heretofore made, be and the same is hereby made final and judgment entered; that the State of Texas do have and recover from the Defendant any part of the aforesaid fine not paid, together with all or further accrued costs in this matter, and that the defendant be punished as indicated above for the period indicated above. If applicable, it appeared to the Court that the ends of justice would best be served by a reformation of the judgment from the original punishment assessed as indicated above to the reformed punishment as indicated above.

IT IS ORDERED by the Court that if the punishment assessed against the Defendant is confinement in the Harris County Jail that the Defendant is remanded to the custody of the Sheriff of Harris County, Texas; unless the Defendant is instructed to voluntarily surrender to the Sheriff on the date the sentence is to begin, as indicated above. The Sheriff shall confine the Defendant in the Harris County Jail as required by law.

IT IS ORDERED by the Court that if the punishment assessed against the defendant is for a fine only, the Defendant is ordered to immediately proceed to the Office of the Harris County Sheriff and pay all fine and court costs as ordered by the Court in this cause; unless the Court orders the Defendant to be committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to begin, as indicated above, to be confined in the Harris County Jail until the fine and costs are fully satisfied in accordance with law; or as indicated above.

IT IS ORDERED by the Court that this sentence runs concurrent with any other sentence(s) unless it is indicated on the Judgment Addendum that the sentence is to run cumulatively.

Signed and entered on DEC 16 2005

JUDGE PRESIDING

Community Supervision Expires on: _____

Notice of Appeal: _____

Mandate Received: _____

After Mandate Received, Sentence to Begin Date is: _____

Received on _____ at _____ AM | PM.
Sheriff, Harris County, Texas

By: _____ Deputy

SPECIAL INSTRUCTION OR NOTES: affirmative finding domestic violence

Entered
Verified
LCBT
LCBU

Right Thumbprint

APPENDIX II

1. 18 U.S.C. 921 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(33)(A) * * * the term "misdemeanor crime of domestic violence" means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal[3] law; and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim[.]

* * * * *

2. 18 U.S.C. 922 provides in pertinent part:

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

* * * * *

---

[3] So in original. Probably should not be capitalized.

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

3. Texas Penal Code § 22.01 (West Supp. 2009) provides in pertinent part:

Assault

(a) A person commits an offense if the person:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse;

(2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

(3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

* * * * *

ORIGINAL

Supreme Court, U.S.
FILED
JUL 12 2010
OFFICE OF THE CLERK

NO. 09-1520

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

REGINAL KEITH HAGEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), respondent Reginal Keith Hagen asks leave to file the accompanying Brief in Opposition without prepayment of costs and to proceed in forma pauperis. Respondent was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A (b) and (c), both in the United States District Court and on appeal to the United States Court of Appeals for the Fifth Circuit.

Date:
July 12, 2010

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

TIMOTHY C. CROOKS
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Attorneys for Petitioners
440 Louisiana, Suite 1350
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RECEIVED
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SUPREME COURT, U.S.

NO. 09-1520

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

REGINALD KEITH HAGEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respectfully submitted,

MARJORIE A. MEYERS
Federal Public Defender
Southern District of Texas
Attorney of Record

TIMOTHY CROCKS
Assistant Federal Public Defender
Attorneys for Petitioners
440 Louisiana, Suite 1350
Houston, Texas 77002-1634
Telephone: (713) 718-4600

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly determined that respondent's Texas conviction for misdemeanor assault by intentionally and knowingly causing bodily injury to a family member did not qualify as a conviction for a "misdemeanor crime of domestic violence," under 18 U.S.C. 922(g)(9), because it did not have "as an element, the use or attempted use of physical force," as required under 18 U.S.C. § 921(a)(33)(A)(ii).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

REASONS FOR DENYING THE WRIT 1

The government's petition for a writ of certiorari should be denied in this case because the Fifth Circuit's conclusion is a correct interpretation of the law, and because review of any perceived conflict in the circuits is not appropriate at this time. 1

A. Introduction. 1

B. Any Conflict Among the Circuits Precedes this Court's Clarification in Leocal and Johnson That the Use of Physical Force Is the Use of Active, Violent Force, Not the Causation of Injury. Therefore, this Court's Intervention Would be Premature. 3

C. The Fifth Circuit Correctly Held That the Element of Causing Bodily Injury Does Not Require Proof of Use of Force. 7

1. The Use of Physical Force Must be the Use of Active, Violent Force. 8

2. The Court Must Look to the Statutory Elements of the Offense Not the Underlying Conduct. 9

3. The Statute Applies to Offenses That Have As An Element the Use of Physical Force, Not to Offenses That Focus on Causing Injury. 14

CONCLUSION 17

TABLE OF CITATIONS

Page

CASES

Bailey v. United States, 516 U.S. 137 (1995) 8

Carachuri-Rosendo v. Holder, ____ S. Ct. ____,
2010 WL 2346552 (U.S. June 14, 2010) 11

Chrzanoski v. Ashcroft, 327 F.3d 188
(2d Cir. 2003) 3, 10

Flores v. Ashcroft, 350 F.3d 666
(7th Cir. 2003) 8, 10

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) 13

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 14

Johnson v. United States,
130 S. Ct. 1265 (2010) . . . . . ii, 2-3, 5-9, 16

Leocal v. Ashcroft, 543 U.S. 1 (2004) . . . ii, 3-5, 7-8, 10, 13

Nijhawan v. Holder, 129 S. Ct. 2294 (2009) 10-11

Shepard v. United States, 544 U.S. 13 (2005) 10

Singh v. Ashcroft, 386 F.3d 1228
(9th Cir. 2004) 12

Taylor v. United States, 495 U.S. 575 (1990) 9-10

United States v. Alexander, 543 F.3d 819
(6th Cir. 2008) 6

United States v. Belless, 338 F.3d 1063
(9th Cir. 2003) 6

United States v. Bonilla-Mungia, 422 F.3d 316
(5th Cir. 2005) 9

United States v. Calderon-Peña, 383 F.3d 254
(5th Cir. 2004) (en banc) 10, 12

United States v. Fulford, 267 F.3d 1241
(11th Cir. 2001) 12

TABLE OF CITATIONS - (Cont'd)

Page

CASES - (Cont'd)

United States v. Griffith, 455 F.3d 1339
(11th Cir. 2006) 6

United States v. Hagen, No. 07-20798, 2009 WL 3294785
(5th Cir. Oct. 14, 2009) (unpublished) 2-3, 6

United States v. Hayes, 129 S. Ct. 1079 (2009) 1, 11

United States v. Jones, 235 F.3d 342
(7th Cir. 2000) 12

United States v. King, No. H-06-0363, 2007 WL 7144780
(S.D. Tex. July 10, 2007) (unpublished) 2

United States v. Landeros-Gonzales, 262 F.3d 424
(5th Cir. 2001) 9

United States v. Morrison, 529 U.S. 598 (2000) 15

United States v. Nason, 269 F.3d 10
(1st Cir. 2001) 3-5

United States v. Perez-Vargas, 414 F.3d 1282
(10th Cir. 2005) 6

United States v. Sampson, 606 F.3d 505
(8th Cir. 2010) 6

United States v. Smith, 171 F.3d 617
(8th Cir. 1999) 3-5

United States v. Vargas-Duran, 356 F.3d 598
(5th Cir. 2003) (en banc) 3, 9, 10

United States v. Villegas-Hernandez, 468 F.3d 874
(5th Cir. 2006) 2-3, 7-10

United States v. White, 606 F.3d 144
(4th Cir. 2010) 5-6

TABLE OF CITATIONS - (Cont'd)

Page

STATUTES

8 U.S.C. § 1101(a)(43)(G) 13

8 U.S.C. § 1326(b) 11

18 U.S.C. § 16 4

18 U.S.C. § 16(a) 4, 7

18 U.S.C. § 16(b) 4-5

18 U.S.C. § 921(a)(33)(A)(ii) . . . . . i, 1, 5-6, 8, 14, 16

18 U.S.C. § 922(g)(1) 9

18 U.S.C. § 922(g)(9) . . . . . i, 1, 7, 9, 11, 15

18 U.S.C. § 924(a)(1)(A) 1

18 U.S.C. § 924(a)(2) 1

18 U.S.C. § 924(e)(2)(B)(i) 2, 5

18 U.S.C. § 924(e)(2)(B)(ii) 9, 14

Tex. Penal Code § 22.01(a)(1) 2

SENTENCING GUIDELINES

USSG § 2L1.2(b)(1)(A)(ii) 6

USSG § 4B1.2(a) 6

USSG § 4B1.2(a)(2) 6

MISCELLANEOUS

Black's Law Dictionary 538 (7th ed. 1999) 10

Black's Law Dictionary 717 (9th ed. 2009) 2, 8

TABLE OF CITATIONS - (Cont'd)

Page

MISCELLANEOUS - (Cont'd)

Brief in Opposition,
Marley v. United States, No. 09-270,
2009 WL 3614462 (Nov. 2, 2009) 7

Brief in Opposition,
McCloud v. United States, No. 09-1177,
2010 WL 2214825 (June 1, 2010) 7

Office of Legal Counsel, United States Department of Justice,
When a Prior Conviction Qualifies As a "Misdemeanor Crime
of Violence" (May 17, 2007), available at
2007 WL 3125588 (hereinafter "OLC Memo") 11-12

REASONS FOR DENYING THE WRIT

The government's petition for a writ of certiorari should be denied in this case because the Fifth Circuit's conclusion is a correct interpretation of the law, and because review of any perceived conflict in the circuits is not appropriate at this time.

A. Introduction.

It is a crime for any person "who has been convicted in any court of a misdemeanor crime of violence," to "possess in or affecting commerce, any firearm or ammunition." 18 U.S.C. § 922(g)(9). The term "misdemeanor crime of violence" means a misdemeanor offense that "has, as an element, the use or attempted use of physical force, or threatened use of a deadly weapon" against a victim with whom the defendant has a domestic relationship. 18 U.S.C. § 921(a)(33)(A)(ii). The statute requires that the use, attempted use or threatened use of force be an element of the predicate offense. United States v. Hayes, 129 S. Ct. 1079, 1084 (2009).

On May 31, 2007, Mr. Hagen was charged in a four-count indictment with two counts of possession of a firearm by a person convicted of a misdemeanor crime of violence, in violation of 18 U.S.C. §§ 922(g)(9) and 924(a)(2), and two counts of making false statements concerning whether he had been convicted of such an offense, in violation of 18 U.S.C. § 924(a)(1)(A). R. 8-11.[1] The charges against Mr. Hagen were predicated on his 2005

[1] References to the record on appeal will be made by the "USCA" page number, or numbers, of the consecutively paginated electronic record, in the following manner: "R.__."

conviction in Harris County, Texas for misdemeanor assault. The Texas statute under which Mr. Hagen was convicted provides: "A person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." See Tex. Penal Code § 22.01(a)(1).

On September 27, 2007, the district court granted Mr. Hagen's motion to dismiss the indictment. R. 78-80; R. 82; see Pet. App. B. Relying on United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006), and United States v. King, No. H-06-0363, 2007 WL 7144780 (S.D. Tex. July 10, 2007) (unpublished)) (Pet. App. C), the district court concluded that Mr. Hagen's prior assault was not a "crime of violence." Pet. App. B.

The Fifth Circuit denied the government's petition for initial en banc review, Pet. App. D, and, agreeing with the district court, affirmed the dismissal. United States v. Hagen, No. 07-20798, slip op. at 2, 2009 WL 3294785 (5th Cir. Oct. 14, 2009) (Pet. App. A). On March 2, 2010, this Court held in Johnson v. United States, 130 S. Ct. 1265 (2010), that the term "use of physical force" as used in defining a "violent felony" under 18 U.S.C. § 924(e)(2)(B)(i) requires an act of "power, violence, or pressure directed against a person or thing." 130 S. Ct. at 1270 (quoting Black's Law Dictionary 717 (9th ed. 2009)). The following day, the Fifth Circuit denied the government's petition to reconsider Mr. Hagen's case. Pet. App. E.

In its petition for certiorari, the government contends that the Fifth Circuit's decision is in conflict with other circuits,

that the Fifth Circuit has misinterpreted the term "use of physical force," and that the decision threatens to impede effective law enforcement. In fact, there is no real circuit conflict, the Fifth Circuit's interpretation of the plainly-worded statute follows this Court's precedent, and the government's law enforcement arguments conflict with its own previous legal memoranda on this issue. In any event, if the government is now dissatisfied with the scope of the statute, it should direct that dissatisfaction to Congress, not to this Court.

B. Any Conflict Among the Circuits Precedes this Court's Clarification in *Leocal* and *Johnson* That the Use of Physical Force Is the Use of Active, Violent Force, Not the Causation of Injury. Therefore, this Court's Intervention Would Be Premature.

In Mr. Hagen's case, the Fifth Circuit relied on its precedent distinguishing between the causation of bodily injury and the use of physical force. Hagen, No. 07-20798, slip op. at 2 (citing United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006)). In Villegas-Hernandez, the Fifth Circuit held that a conviction for assault under the Texas statute was not a crime of violence because the "intentional causation of injury does not necessarily involve the use of force." 468 F.3d at 881 (quoting Chrzanoski v. Ashcroft, 327 F.3d 188, 195 (2d Cir. 2003), and citing United States v. Vargas-Duran, 356 F.3d 598, 606 (5th Cir. 2003) (en banc)).

The government contends that the Fifth Circuit's decision in this case is in conflict with the First Circuit's decision in United States v. Nason, 269 F.3d 10, 22 (1st Cir. 2001), and the Eighth

Circuit's decision in United States v. Smith, 171 F.3d 617, 621 (8th Cir. 1999). Pet. 8, 14-15. In Smith, the Eighth Circuit summarily concluded that "an act intended to cause pain, injury, or offensive or insulting physical contact" was an offense with an element of physical force. 171 F.3d at 621. The First Circuit recognized that the federal statute "focuses on the assailant's conduct," while the Maine statute at issue focused "on the victim's circumstances (i.e. whether the victim endured either bodily injury or an offensive physical contact)." Nason, 269 F.3d at 19-20. Assuming that physical force must necessarily be used to cause physical injury, the First Circuit held that the Maine statute proscribed a crime of violence as defined under the federal statute. 269 F.3d at 18-21.

Subsequent to the decisions in Smith and Nason, this Court endorsed the distinction between the use of force and the causation of injury. See Leocal v. Ashcroft, 543 U.S. 1, 10-11 & n.7 (2004). In Leocal, the Court addressed the question whether a conviction for driving under the influence ("DUI") with serious bodily injury was a crime of violence under 18 U.S.C. § 16, which defines a crime of violence as an offense that 1) has as an element the use, attempted use or threatened use of physical force, or 2) the substantial risk that such force will be used. 18 U.S.C. § 16(a) & (b). This Court explained that the element of substantial risk in § 16(b) "relates **not** to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing the crime." Leocal, 543 U.S. at 10 (emphasis in original). The statute

"plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not the possible effect of a person's conduct." 543 U.S. at 10 n.7. Thus, in Leocal, this Court rejected the First and Eighth Circuits' assumptions underlying their decisions in Nason and Smith that causation of bodily injury necessarily entails the use of physical force. Id.

Just last term, this Court addressed the meaning of the "use of physical force" requirement in the definition of a "violent felony" under the Armed Career Criminal Act. See Johnson v. United States, 130 S. Ct. 1265 (2010) (interpreting 18 U.S.C. § 924(e)(2)(B)(i)). The Court held that the "use of physical force" necessarily entails the exertion of "power, violence, or pressure." 130 S. Ct. at 1270.

The Fourth Circuit is the only circuit other than the Fifth to have addressed the § 921(a)(33)(A)(ii) definition of "crime of violence" since Johnson, and it too concluded that the phrase "physical force" means "**violent** force." See United States v. White, 606 F.3d 144, 151-53 (4th Cir. 2010) emphasis in original). In doing so, the Fourth Circuit noted that Johnson had resolved any potential conflict with the First Circuit decision in Nason and the Eighth Circuit decision in Smith. See White, 606 F.3d at 152-53.[2]

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[2] The Fourth Circuit also mentioned that Johnson had effectively overruled the Eleventh Circuit's decision in United States v. Griffith, 455 F.3d 1339 (11th Cir. 2006), which involved (continued...)

In other words, both the Fifth Circuit's decision in Hagen and the Fourth Circuit's decision in White are in accord. See also United States v. Belless, 338 F.3d 1063, 1067-69 (9th Cir. 2003).

Moreover, the Eighth Circuit has already given indications that its case law on the subject may be ripe for reconsideration in light of Johnson. In United States v. Sampson, 606 F.3d 505, 511 (8th Cir. 2010), the Eighth Circuit acknowledged that Johnson had clarified that a statute that focuses on the risk of injury is not categorically a crime of violence under a provision that requires as an element the use of physical force. Sampson, 606 F.3d at 511.[3]

Thus, the courts have not disagreed on the application of 18 U.S.C. § 921(a)(33)(A)(ii) following this Court's determination that a crime of violence definition requiring the use of physical force requires the active use of violent, physical force, see Johnson, 130 S. Ct. at 1270, rather than the causation of injury. See Leocal, 543 U.S. at 10-11 & n.7. Far from presenting a circuit

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[2] (...continued)
the same battery statute deemed not to be a crime of violence in Johnson. White, 606 F.3d at 152.

[3] Citing United States v. Alexander, 543 F.3d 819, 823 (6th Cir. 2008) (assault is a crime of violence under USSG § 4B1.2(a)), and United States v. Perez-Vargas, 414 F.3d 1282, 1285-87 (10th Cir. 2005) (assault is not a crime of violence under USSG § 2L1.2(b)(1)(A)(ii)), the government also contends that the circuits have reached conflicting results under the Sentencing Guidelines in reference to use of force provisions. Pet. 15 n.6. In fact, the assault at issue in Alexander could have been considered a crime of violence under USSG § 4B1.2(a)(2), which focuses on the risk of injury. Alexander, 543 F.3d at 823. Here again, the government fails to perceive the difference between predicates that focus on the defendant's use of force and those that focus on the potential harm to others.

split, the government is actually arguing that the Fifth and Fourth circuits have misinterpreted Johnson. See Pet. 12 n.4.

In sum, the only two circuits to have addressed the implications of Johnson for prosecutions under 18 U.S.C. § 922(g)(9) are in agreement and the other circuits have not yet had the opportunity to address the issue. Therefore, there is no reason for this Court to intervene, and a grant of certiorari in Mr. Hagen's case would be premature. Cf. Brief in Opposition, McCloud v. United States, No. 09-1177, 2010 WL 2214825, at *10-*11 (June 1, 2010); Brief in Opposition, Marley v. United States, No. 09-270, 2009 WL 3614462, at *10 (Nov. 2, 2009) ("With the exception of the Third Circuit's decision . . ., those cases were decided before [*this Court's decision*] which substantially clarified the issue [concerning equitable tolling] . . . At least until other courts have had the opportunity to consider the issue in light of [this Court's decision], this Court's review would be premature.").

C. The Fifth Circuit Correctly Held That the Element of Causing Bodily Injury Does Not Require Proof of Use of Force.

1. The Use of Physical Force Must Be the Use of Active, Violent Force.

In Villegas-Hernandez, the Fifth Circuit held that the Texas offense of assault, defined as intentionally, knowingly or recklessly causing bodily injury, was not a crime of violence under 18 U.S.C. § 16(a), because it did not include as an element the use or attempted use of "physical force." 468 F.3d at 883. Relying on Villegas-Hernandez, the lower courts held that Mr. Hagen's assault

conviction could not be considered a domestic crime of violence under 18 U.S.C. § 921(a)(33)(A)(ii), which likewise requires as an element the use or attempted use of physical force. Pet. Apps. A & B.

In Leocal, this Court held that the use of physical force means the "active employment" of force, 543 U.S. at 9 (citing Bailey v. United States, 516 U.S. 137, 143 (1995)). In the context of a "crime of violence," the term means "violent, active crimes." Id. at 11. The focus is on the defendant's conduct, not the harm to the victim. Id. at 10-11 & n.7. Contrary to the government's suggestion, Leocal did not hold that "physical force is the means by which injury is necessarily produced." Pet. 8. In fact, the Court held the opposite: that a defendant could cause injury without the active employment of physical force. Leocal, 543 U.S. at 10-11 & n.7 (holding that DUI with serious bodily injury was not a crime of violence).

In Johnson, this Court reiterated that the "use of physical force" necessarily entails "active power." 130 S. Ct. at 1270. Such "force" is "power, violence, or pressure directed against a person or thing." Id. (citing Black's Law Dictionary 717 (9th ed. 2009)). Emphasizing that it was defining a "violent" offense, the Court thought it clear that "the phrase 'physical force' means ***violent*** force – that is, force capable of causing physical pain or injury to another person." Id. at 1271 (emphasis in original) (citing Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003)

(Easterbrook, J.)).[4] Similarly, the Fifth Circuit has held that the "use of force" in a statutory definition of a "crime of violence," is "synonymous with destructive or violent force." Villegas-Hernandez, 468 F.3d at 879 (quoting United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001)).[5]

2. The Court Must Look to the Statutory Elements of the Offense Not the Underlying Conduct.

In determining the elements of a predicate offense, the Fifth Circuit focuses on the statutory definition, not the defendant's underlying conduct. Villegas-Hernandez, 468 F.3d at 878 (citing Taylor v. United States, 495 U.S. 575, 602 (1990), and United States v. Bonilla-Munguia, 422 F.3d 316, 320 (5th Cir. 2005)). As the Fifth Circuit has explained:

> [A]n element is "[a] constituent part of a claim that must be proved for the claim to succeed." . . . If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element - implicit or explicit - of the crime.

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[4] While the Court also remarked that there was "no reason to define 'violent felony' by reference to a nonviolent misdemeanor," 130 S. Ct. at 1272, the Court's emphasis in Johnson was on the use of the term "violent." Id. at 1271-72.

[5] The government's suggestion that the Fifth Circuit's use-of-force test would exclude offenses such as murder from the prohibition on possessing firearms, Pet. 10, is disingenuous. Section 922(g)(9) proscribes possession of a firearm by a person convicted of a *misdemeanor* crime of domestic violence. A person convicted of a felony offense, such as murder, is also precluded from possessing a firearm. 18 U.S.C. § 922(g)(1). Further, the Armed Career Criminal Act enhancements apply to felony convictions that present a "serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

Vargas-Duran, 356 F.3d at 605 (citing Black's Law Dictionary 538 (7th ed. 1999)); accord Villegas-Hernandez, 468 F.3d at 879.

In Villegas-Hernandez, the Fifth Circuit held that a Texas conviction for assault based on causing bodily injury is not per se a crime of violence because a defendant can cause such injury without the use of physical force, for example, by offering the victim a poisoned drink or telling the victim to walk backward out into oncoming traffic. 468 F.3d at 879. Similarly in Trzcinski, the Second Circuit recognized that "human experience suggests numerous examples of intentionally causing physical injury without the use of force, such as a doctor who deliberately withholds vital medicine." 327 F.3d at 195. Thus, an assault based on causing bodily injury is not necessarily a crime of violence. Villegas-Hernandez, 468 F.3d at 883.

The government emphasizes that the indictment in Mr. Hagen's case alleged that he had hit the complainant. But, as under the modified categorical approach, a court may look to certain conclusive court documents, including the indictment, to determine the offense of conviction. See Shepard v. United States, 544 U.S. 13, 21 (2005); Taylor, 495 U.S. at 602. It cannot, however, look to the facts underlying the defendant's crime to determine the elements and nature of the offense of conviction. Leocal, 543 U.S. at 7; see also United States v. Calderon-Pena, 383 F.3d 254, 257 (5th Cir. 2004) (en banc); Flores, 350 F.3d at 670.

This Court's decision in Nijhawan v. Holder, 129 S. Ct. 2294 (2009), is not to the contrary. In the context of an administrative

immigration proceeding in Nijhawan, the Court considered the underlying facts as to the amount of loss to determine that a fraud conviction was an aggravated felony only because the definition referred to "conduct involved," rather than an element of the offense. 129 S. Ct. at 2302.[6] There was no dispute, however, that Nijhawan had been convicted of fraud. See Carachuri-Rosendo v. Holder, ____ S. Ct. ____, 2010 WL 2346552, at *8 n.11 (U.S. June 14, 2010). Indeed, while interpreting the statute at issue in this case in Hayes, this Court distinguished between the requirement of proof that the defendant had been convicted of a predicate offense that "had as an element the use or attempted use of physical force," and the specific circumstance of the relationship between the defendant and the victim. 129 S. Ct. at 1084.

Despite the government's criticism of the Fifth Circuit's "has as an element" test, and particularly the "any set of facts" formulation, that test, and that formulation, are firmly grounded in bedrock principles of law, as, indeed, the United States Department of Justice has elsewhere recognized in the very context presented here. See Office of Legal Counsel, United States Department of Justice, When a Prior Conviction Qualifies As a "Misdemeanor Crime of Violence" (May 17, 2007), 2007 WL 3125588 (hereinafter "OLC Memo"). As the OLC Memo recognized, "the prohibition [in § 922(g)(9)] turns on the ***legal definition*** of the

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[6] The government conceded that it would have to prove the loss to a jury beyond a reasonable doubt if it were seeking an aggravated felony enhancement under the criminal statute, 8 U.S.C. § 1326(b). See Nijhawan, 129 S. Ct. at 2302.

predicate offense of conviction, not on the ***actual conduct*** that may have led to the conviction for the offense. One must determine what the convicting court found, not what the defendant did." OLC Memo, at 2 (emphasis in original).

Even more significantly, immediately after this language, the OLC Memo acknowledged that this Court's interpretation of the "has as an element" rubric derived from a proper interpretation of the term "element":

> This conclusion follows from a proper understanding of the key statutory term "element." Elements are the factual predicates of an offense that are specified by law and must be proved to secure a conviction. . . . If conviction of a given offense can be secured without proof of a certain fact, that fact is not an element of that offense. ***As the en banc Fifth Circuit has explained: "If any set of facts would support a conviction without proof of that component, then the component most decidedly is not an element - implicit or explicit - of that crime." United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004);*** see also Singh v. Ashcroft, 386 F.3d 1228, 1231 (9th Cir. 2004) ("An element of a crime is a constituent part of the offense which must be proved by the prosecution in every case to sustain a conviction under a given statute.") (internal quotation marks [and internal emphasis] omitted); United States v. Fulford, 267 F.3d 1241, 1250 (11th Cir. 2001) ("At common law, the word 'element' refers to a constituent part[ ] of a crime which must be proved by the prosecution to sustain a conviction.") (internal quotation marks omitted); United States v. Jones, 235 F.3d 342, 347 (7th Cir. 2000) (holding that an assault and battery conviction did not qualify as a "crime of violence" under the Sentencing Guidelines because "actual, attempted, or threatened physical force is not a necessary element of the offense").

OLC Memo, at 3 (emphasis added) (some citations omitted). And the OLC Memo also endorses the limited "paring down" approach to the "has as an element" question that the Fifth Circuit adopted, sitting en banc, in Calderon-Peña. See OLC Memo, at 8.

The government's protestations concerning the Fifth Circuit's approach to "has as an element" questions should be met with considerable skepticism, especially because others in the same Department of Justice have apparently found no logical or jurisprudential inconsistencies in that approach. Nevertheless, Mr. Hagen will, out of an abundance of caution, address the government's contention, see Pet. 13, that the Fifth Circuit's "has as an element" analysis is inconsistent with this Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007).

The problem with the government's argument is that Duenas-Alvarez had nothing to do with the "has as an element" analysis. In Duenas-Alvarez, the Court considered whether the California statutory offense of aiding and abetting the taking of a vehicle without consent was the ***enumerated*** offense of "theft" for purposes of 8 U.S.C. § 1101(a)(43)(G). See Duenas-Alvarez, 549 U.S. at 185-94. In the context of an enumerated offense, the Court looks at whether there is "something ***special***" about state law that criminalizes conduct that most other states would not consider to be the generic offense. Duenas-Alvarez, 549 U.S. at 820 (emphasis in original). In other words, there must be a "realistic probability" that the State would apply its law outside the norm. Id. at 193. On the other hand, the "has as an element" analysis, as informed by the "any set of facts" test, is compelled by the plain language of the statute (particularly, its use of the word "element"). See Leocal, 543 U.S. at 7. As the Court recognized in Leocal, if injury can be caused without the use of physical force,

then such force is not an element of the offense. 543 U.S. at 10-11, n.7. This is necessarily a hypothetical analysis based on the language of the statute itself.

3. The Statute Applies to Offenses That Have As An Element the Use of Physical Force, Not to Offenses That Focus on Causing Injury.

The government insists that Congress intended § 921(a)(33)(A)(ii) to describe "generic, common-law battery crimes, including crimes involving the causation of bodily injury by subtle and indirect uses of physical force." Pet. 12. Whatever Congress intended, the statute requires that the predicate offense must "have as an element the use or attempted use of physical force." Congress has demonstrated that it is capable of explicitly defining predicate offenses in terms of injury or risk of injury, rather than the use of force, when it desires to do so. See 18 U.S.C. §§ 924(e)(2)(B)(ii). Similarly, Congress is capable of enumerating the offenses covered by a particular statute. See, e.g., id. (burglary, arson, extortion). Congress did neither here.

The first answer to the government's argument is that "[t]he remedy for any dissatisfaction with the results in particular cases lies with Congress and not with [the courts]. Congress may amend the statute; [the courts] may not." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 576 (1982) (citations omitted). And, indeed, if Congress is dissatisfied with the results produced by this Court's statutory construction of the relevant language, it can easily amend the statute to explicitly adopt the interpretation that

the government espouses.

Additionally, to the extent the government implies that efforts to keep guns out of the hands of domestic abusers will be crippled by this interpretation, the government ignores the fact that 18 U.S.C. § 922(g)(9) is not the end-all and be-all for addressing this problem. States can and do have penal laws and other mechanisms (e.g., restraining orders) capable of addressing this problem. And, indeed, under our federalist system, this is the sort of police power that is more appropriately exercised by the states than by the federal government. As this Court has noted, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and the vindication of its victims." United States v. Morrison, 529 U.S. 598, 618 (2000) (footnote and citations omitted). Even though § 922(g)(9) may not run afoul of the Constitution, our federalist system counsels against treating § 922(g)(9) as the primary mechanism for addressing a problem better addressed by the states.

One other point must be raised: Mr. Hagen has been living under the shadow of this case for a long time. He was indicted on May 31, 2007, and the charges were dismissed on September 27, 2007. The Fifth Circuit denied the government's second petition for en banc review on March 3, 2010. See Pet. App. E. It is now more than three years since Mr. Hagen was called to answer these charges.

For the reasons previously stated, this Court should not prolong the uncertainty for Mr. Hagen any further. Instead, the

Court should give the circuits the opportunity to address Johnson's clarification of the meaning of "the use of physical force" as applied to § 921(a)(33)(A)(ii)'s definition of crime of violence. The government's petition for writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Date:

July 12, 2010

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No. 09-1520

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD KEITH HAGEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. The court of appeals' decision incorrectly constricts the scope of Section 922(g)(9) 2
B. The conflict among the courts of appeals is ripe for resolution 8
C. This Court's review is warranted 10

TABLE OF AUTHORITIES

Cases:

Chrzanoski v. *Ashcroft*, 327 F.3d 188 (2d Cir. 2003) 5
Gonzalez v. *Duenas-Alvarez*, 549 U.S. 183 (2007) 7, 8
Johnson v. *United States*, 130 S. Ct. 1265 (2010) 1, 4, 9
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 1, 3
Taylor v. *United States*, 495 U.S. 575 (1990) 7, 8
United States v. *Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004), cert. denied, 543 U.S. 1076 (2005) 6
United States v. *Nason*, 269 F.3d 10 (1st Cir. 2001) 8, 9
United States v. *Sampson*, 606 F.3d 505 (8th Cir. 2010) 10
United States v. *Smith*, 171 F.3d 617 (8th Cir. 1999) 5, 8, 9
United States v. *Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006), cert. denied, 549 U.S. 1245 (2007) 5
United States v. *White*, 606 F.3d 144 (4th Cir. 2010) 9

Statutes and guidelines:

Armed Career Criminal Act of 1984, 18 U.S.C. 924(e):
18 U.S.C. 924(e)(2)(B)(i) 4
18 U.S.C. 924(e)(2)(B)(ii) 6, 8

Statutes and guidelines—Continued: Page

18 U.S.C. 16 4
18 U.S.C. 16(a) 2, 3
18 U.S.C. 16(b) 3
18 U.S.C. 373(a) 7
18 U.S.C. 521(c)(2) 7
18 U.S.C. 921(a)(33)(A) 4, 6, 7
18 U.S.C. 921(a)(33)(A)(ii) 1, 4, 5
18 U.S.C. 922(g)(1) 6
18 U.S.C. 922(g)(9) 1, 4, 8, 9, 10, 11
720 Ill. Comp. Stat. Ann. § 5/11-6(a) (West 2002) 10
Tex. Penal Code Ann. (West 2003):
§ 1.07(a)(8) 4
§ 22.01(a)(1) 4, 7
United States Sentencing Guidelines § 4B1.2(a)(1) 10

Miscellaneous:

Memorandum from C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence"* (May 17, 2007), http://www.justice.gov/olc/2007/atfmcdv-opinion.pdf 5
Wayne R. LaFave, *Substantive Criminal Law* (2d ed. 2003) 6

In the Supreme Court of the United States

No. 09-1520

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD KEITH HAGEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Fifth Circuit in this case held that a person convicted of misdemeanor assault by intentionally and knowingly causing bodily injury to a family member has not been convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. 922(g)(9), because, in the court's view, a bodily-injury assault can be committed without the "use * * * of physical force," 18 U.S.C. 921(a)(33)(A)(ii). That holding conflicts with decisions of the First and Eighth Circuits and will greatly impede enforcement of an important statute designed to keep firearms out of the hands of dangerous individuals.

Respondent argues that this Court should deny review because the Court's decisions in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), and *Johnson* v. *United States*, 130 S. Ct. 1265 (2010), may cause the two other courts of appeals that disagree with the Fifth Circuit to change their minds. But neither *Leocal* nor *Johnson* provides

any support for the decision below, and respondent's remaining arguments in defense of that decision lack merit. If allowed to stand, the decision will substantially undercut the uniform and effective enforcement of a law designed to provide a nationwide solution to a nationwide problem: the possession of firearms by those convicted of violent crimes against their families. This Court's review is warranted.

A. The Court Of Appeals' Decision Incorrectly Constricts The Scope Of Section 922(g)(9)

The court of appeals' view that assaults that result in bodily injury do not categorically involve the "use * * * of physical force" conflicts with the ordinary usage of that phrase, as well as its more specialized usage to describe the common-law crime of battery. The court's decision, moreover, rests purely on hypothesized applications of a state criminal statute rather than concrete evidence of the manner in which state courts have applied the statute. Pet. 7-14. Respondent's efforts to defend the court of appeals' decision are unavailing and provide no basis for denying review.

1. At the outset, respondent contends (Br. in Opp. 4-5, 7-9) that further review is unwarranted because the decision below follows from this Court's decisions in *Leocal* and *Johnson*. Respondent's contention is incorrect.

a. In *Leocal*, this Court held that the crime of causing bodily injury while driving under the influence of alcohol (DUI) is not a "crime of violence" under 18 U.S.C. 16(a) because "[t]he key phrase in § 16(a) —the 'use . . . of physical force against the person or property of another'— most naturally suggests a higher degree of intent than negligent or merely accidental con-

duct." 543 U.S. at 9. The Court explained that, in context, the word "use" means "active employment," and "[w]hile one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident." *Ibid.*; see *ibid.* ("[A] person would 'use . . . physical force against' another when pushing him; however we would not ordinarily say a person 'use[s] . . . physical force against' another by stumbling and falling into him.") (second set of brackets in original).

For the same reason, the Court concluded that the DUI offense at issue was not a "crime of violence" under 18 U.S.C. 16(b), which covers felony offenses that "involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." The Court explained that "[t]he 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may 'use' physical force against another in committing the DUI offense." *Leocal*, 543 U.S. at 10 n.7 (citations omitted). The Court thus concluded that Section 16(b), like Section 16(a), requires "a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense." *Id.* at 11.

This case, unlike *Leocal*, does not concern accidental or negligent causation of bodily injury. Respondent did not injure his family member by stumbling and falling into her; he was convicted of "*intentionally and knowingly* caus[ing] bodily injury" to his victim. Pet. App. 19a (emphasis added); see Pet. 7 n.3. Thus, even assum-

ing that *Leocal*'s reading of Section 16's definition of "crime of violence" applies equally to the definition of "misdemeanor crime of domestic violence" in Section 921(a)(33)(A), but cf. *Johnson*, 130 S. Ct. at 1273, *Leocal*'s reading of Section 16's use-of-force language as excluding accidental or negligent conduct provides no support for the court of appeals' decision in this case.

b. Respondent's reliance on this Court's decision in *Johnson* (Br. in Opp. 5, 8-9) is similarly misplaced. In *Johnson*, this Court held that the term "physical force," as it appears in the first prong of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(i), means "*violent* force —that is, force capable of causing physical pain or injury to another person." *Johnson*, 130 S. Ct. at 1271. In so holding, the Court expressly reserved the question whether "physical force" has the same meaning in the context of the definition of "misdemeanor crime of domestic violence" for purposes of Section 922(g)(9). *Id.* at 1273. But in any event, as the government explained in its petition, see Pet. 12 n.4, the Texas assault offense at issue in this case does categorically involve "violent force" as this Court interpreted the term in *Johnson* because it requires proof that the defendant caused bodily injury. See Tex. Penal Code Ann. § 1.07(a)(8) (West 2003) (defining the term "[b]odily injury," as required by Texas Penal Code Ann. § 22.01(a)(1) (West 2003), to mean "physical pain, illness, or any impairment of physical condition").

2. Respondent argues (Br. in Opp. 9-14) that further review is unwarranted because the court of appeals' decision follows from Section 921(a)(33)(A)(ii)'s focus on the elements of predicate crimes, rather than the conduct underlying them. That argument rests on a funda-

mental misconception about the government's position. The government's argument is not that respondent has been convicted of a "misdemeanor crime of domestic violence" because, as a factual matter, he injured a family member by striking her with his hand. See *id.* at 10. The government's argument is, rather, that respondent has been convicted of a "misdemeanor crime of domestic violence" because, to convict him of bodily-injury assault, the prosecution was required to prove that he used physical force against his victim.[1]

Respondent does not explain how a defendant can intentionally and knowingly cause bodily injury without using physical force, other than to repeat the Fifth Circuit's examples of a defendant who "offer[s] the victim a poisoned drink or tell[s] the victim to back his car out into oncoming traffic," Br. in Opp. 10 (citing *United States* v. *Villegas-Hernandez*, 468 F.3d 874, 879 (2006), cert. denied, 549 U.S. 1245 (2007)), and the Second Circuit's example of "a doctor who deliberately withholds vital medicine," *ibid.* (citing *Chrzanoski* v. *Ashcroft*, 327 F.3d 188, 196 (2003)). But as the petition explained (at 8-9), even in those hypothetical examples, the defendant has "use[d] * * * physical force" because he has actively employed physical force "to work according to his

[1] Contrary to respondent's contention (Br. in Opp. 11-12), that position is consistent with the Office of Legal Counsel memorandum on which respondent relies. See Memorandum from C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, *When a Prior Conviction Qualifies as a "Misdemeanor Crime of Domestic Violence"* 3, 8-9 (May 17, 2007), http://www.justice.gov/olc/2007/atfmcdv-opinion.pdf (citing with approval the Eighth Circuit's decision in *United States* v. *Smith*, 171 F.3d 617, 620-621 (1999), which held, *inter alia*, that an assault offense involving an act intended to cause pain or injury to another has a use-of-force element within the meaning of Section 921(a)(33)(A)(ii)).

will" to cause injury to the victim. *United States* v. *Calderon-Pena*, 383 F.3d 254, 270 (5th Cir. 2004) (en banc) (Smith, J., dissenting), cert. denied, 543 U.S. 1076 (2005). Such offenses have long been understood to involve the "use of physical force" as that phrase has been employed to describe the common-law crime of battery. See Pet. 10-12; see also 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(a) and (b), at 554-555 (2d ed. 2003). Respondent provides no answer to either point.

Respondent appears to acknowledge (Br. in Opp. 9 n.5) that the court of appeals' reading would have the absurd consequence of excluding offenses such as murder from the reach of the use-of-force language common to many federal crime-of-violence definitions. That is so because murder, like assault, is often defined as causing a particular result (*i.e.*, death), rather than by specifying the means used to accomplish the result, and often can be accomplished by indirect and subtle uses of force, as by poisoning. See Pet. 9-10.

Respondent argues that a felony murder conviction would still trigger a ban on firearms possession under the federal felon-in-possession statute, 18 U.S.C. 922(g)(1), and would qualify as a "violent felony" under the second prong of the ACCA definition, which reaches crimes involving conduct that "presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii). Br. in Opp. 9 n.5. But it makes little sense to posit that Congress intended the crime of murder to count as a "violent felony" because it presents a "potential risk" of injury. 18 U.S.C. 924(e)(2)(B)(ii). In any event, respondent fails to consider the effect of his anomalous interpretation of Section 921(a)(33)(A)'s use-of-force language on the many other crime-of-violence provisions that define covered offenses solely by refer-

ence to the use of physical force. See, *e.g.*, 18 U.S.C. 373(a) (prohibiting efforts to persuade a person to commit a federal felony "that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another"); 18 U.S.C. 521(c)(2) (providing a sentencing enhancement for criminal street gang members who in connection with the gang commit a "crime of violence that has as an element the use or attempted use of physical force against the person of another"); see also Pet. 10 (citing additional statutes). Respondent offers no reason to think Congress would have intended such provisions to exclude prototypically violent crimes such as murder, simply because murder in many States can be committed by subtle and indirect uses of force.

3. Even if Section 921(a)(33)(A) were read to exclude any assault crime capable of commission by indirect and subtle uses of force, respondent, like the court of appeals, identifies no evidence that Texas Penal Code § 22.01(a)(1) has been applied in that manner. Respondent insists (Br. in Opp. 13-14), however, that, contrary to this Court's guidance in *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), he need not establish a "realistic probability" that the state statute would be so applied. *Id.* at 193. In respondent's view, *Duenas-Alvarez* applies only in determining whether a state crime counts as an enumerated offense under federal law (for example, "theft" or "burglary"), not in determining whether a state crime "has as an element" the use of physical force as required by a federal definition. See Br. in Opp. 13. There is, however, no relevant distinction between the two inquiries. As this Court made clear in *Taylor* v. *United States*, 495 U.S. 575 (1990), a state crime counts as an enumerated offense if it "has * * * all the *ele-*

ments" of the enumerated crime's generic definition. *Id.* at 599 (emphasis added); see *id.* at 598 (identifying the elements of generic "burglary" for purposes of the ACCA, 18 U.S.C. 924(e)(2)(B)(ii)); *Duenas-Alvarez*, 549 U.S. at 186-187 (discussing *Taylor*). This Court's guidance in *Duenas-Alvarez* is relevant to this case, and it suggests that the court of appeals erred in relying on nothing more than highly stylized hypothetical applications of the statute to hold that Texas bodily-injury assault on a family member is not a "misdemeanor crime of domestic violence" under Section 922(g)(9).

B. The Conflict Among The Courts Of Appeals Is Ripe For Resolution

Respondent does not dispute that the Fifth Circuit's decision in this case conflicts with decisions of the First and Eighth Circuits. See *United States* v. *Nason*, 269 F.3d 10, 20 (1st Cir. 2001); *United States* v. *Smith*, 171 F.3d 617, 620-621 (8th Cir. 1999). He argues, however, that review of that conflict would be premature because this Court's decisions in *Leocal* and *Johnson* may cause the First and Eighth Circuits to change their views. Respondent's argument lacks merit.

1. For the reasons explained above, see pp. 2-4, *supra*, neither *Leocal* nor *Johnson* provides any support for the court of appeals' decision in this case. Unlike *Leocal*, this case does not concern the accidental or negligent infliction of bodily injury. And unlike *Johnson*, it does not concern battery by touching another against his or her will. Rather, it concerns the offense of assault by intentionally and knowingly causing bodily injury to another. There is thus no reason to think that either *Leocal* or *Johnson* would prompt the First Circuit or the Eighth Circuit to reconsider the conclusion that misde-

meanor assault or battery offenses involving the infliction of bodily injury on a family member qualify as misdemeanor crimes of domestic violence under Section 922(g)(9).

2. Respondent errs in comparing this case to *United States* v. *White*, 606 F.3d 144, 151-153 (4th Cir. 2010), which relied on *Johnson* to disqualify common-law battery as a "misdemeanor crime of domestic violence" because the offense "may be accomplished with the slightest touch and no physical injury is required." *Id.* at 148, 153. Whether *Johnson* should be extended from the ACCA context to Section 922(g)(9) is an important question, which, in the government's view, the Fourth Circuit answered incorrectly. The propriety of that extension is not at issue here, however, because the Texas bodily-injury assault statute is not satisfied by "the slightest touch," but rather requires bodily injury. It thus requires proof of "violent force" as this Court interpreted the term in *Johnson*. See p. 4, *supra*.[2]

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[2] Although respondent notes (Br. in Opp. 5) that the *White* court believed that *Johnson* resolved a conflict between the decisions in *Nason* and *Smith* and the decisions of other courts of appeals, the conflict in question is not the conflict at issue in this case. See *White*, 606 F.3d at 149-151. In addition to holding that bodily-injury assault and battery offenses qualify as "misdemeanor crimes of domestic violence," the courts in *Nason* and *Smith* also held that offensive-touching battery so qualifies. See *Nason*, 269 F.3d at 20; *Smith*, 171 F.3d at 621 n.2. As the Court in *White* noted, *Johnson* is relevant to the second question. See *White*, 606 F.3d at 151. It is not, however, relevant to the first question —that is, the question at issue in this case—except insofar as it tends to suggest that bodily-injury assault does involve the use of "*violent* force." See *Johnson*, 130 S. Ct. at 1271.

As noted in the petition (at 12 n.4), the government disagrees with *White*'s extension of *Johnson* to the Section 922(g)(9) context and filed a petition for rehearing. The rehearing petition has since been denied.

3. Respondent also errs (Br. in Opp. 6) in suggesting that the Eighth Circuit's decision in *United States* v. *Sampson*, 606 F.3d 505 (2010), demonstrates that the court is poised to reconsider its position on the question presented in light of *Johnson*. In *Sampson*, the Eighth Circuit noted that the government had not disputed that the Illinois offense of indecent solicitation of a child lacks a use-of-force element for purposes of the definition of "crime of violence" in Sentencing Guidelines § 4B1.2(a)(1), and the court observed that the conclusion was consistent with *Johnson*. 606 F.3d at 511. The indecent solicitation offense at issue in *Sampson* did not, however, require proof that the defendant intentionally or knowingly caused bodily injury. See 720 Ill. Comp. Stat. Ann. § 5/11-6(a) (West 2002). Respondent fails to explain how *Sampson*'s discussion of the indecent solicitation offense at issue there suggests that the Eighth Circuit may reconsider its view as to the assault offense at issue here.

C. This Court's Review Is Warranted

States across the country punish the intentional or knowing causation of bodily injury, without more, as misdemeanor assault or battery. If, as the court of appeals concluded, a conviction under such a statute in a domestic context is not a "misdemeanor crime of domestic violence," then Section 922(g)(9) will have no application to many persons convicted of misdemeanor domestic-violence crimes in much of the country. Pet. 16-17.

Respondent does not dispute that the court of appeals' reading of Section 922(g)(9) substantially under-

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White, No. 09-4114 (4th Cir. June 29, 2010). This case, however, provides no occasion to consider the question presented in *White*.

mines Section 922(g)(9)'s effectiveness in keeping guns out of the hands of domestic abusers. He argues, however, that such a result does not merit the Court's attention because Section 922(g)(9) "is not the end-all and be-all for addressing this problem." Br. in Opp. 15. That other statutes might be enacted to address the problem provides no basis for declining to give a fair reading to the statute that Congress did enact or for declining to resolve a conflict of authority that threatens to undermine that statute's enforcement.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JULY 2010